

ORIGINAL
7 6 No. 12389

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United States
Court of Appeals

For the Ninth Circuit.

RECONSTRUCTION FINANCE CORPORATION, a corpora-
tion,

Appellant,

vs.

H. H. ROUAT, Individually, and as Administrator
of the Estate of Roy Paula Rouat, Deceased,
and as Trustee of an express trust,

Appellee,

and

H. H. ROUAT, Individually, and as Administrator
of the Estate of Roy Paula Rouat, Deceased, and
as Trustee of an express trust,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corpora-
tion,

Appellee.

Transcript of Record

Appeals from the United States District Court of Appeals
for the District of Montana.

No. 12389
DISTRICT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED

FEB 7 - 1950

United States
Court of Appeals
For the Ninth Circuit.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellant,

vs.

MAY PAULA MOUAT and M. W. MOUAT, wife and husband,
and MAY PAULA MOUAT, as trustee of an express trust,
Appellees,

and

MAY PAULA MOUAT and M. W. MOUAT, wife and husband,
and MAY PAULA MOUAT, as trustee of an express trust,
Appellants,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

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Transcript of Record

Appeals from the United States District Court,
for the District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States in and
for the District of Montana, Billings Division

No. 871

MAY PAULA MOUAT and M. W. MOUAT, wife
and husband, and MAY PAULA MOUAT as
Trustee of an express trust,

Plaintiffs,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION and WAR ASSETS ADMINISTRA-
TION, an agency of the United States of
America.

Defendants.

COMPLAINT

The plaintiffs complain and allege:

I.

That Reconstruction Finance Corporation at all
times herein mentioned was and now is a corpora-
tion organized and existing under and by virtue of
the laws of the United States of America, and doing
business in the District and State of Montana.

I—a.

This action arises under the Act of 47 Stat. 5,
U. S. C. A., Title 15, Sec. 601 et seq., as amended 54
Stat. 574, U. S. C. A., Title 15, Sec. 613c, and under
Judicial Code Sec. 24, U. S. C. A., Title 28, Sec. 41.
The matter in controversy exceeds, exclusive of in-
terest and costs, the sum of Three Thousand Dol-
lars.

II.

That War Assets Administration is an agency and has been such agency of the United States Government, established by executive order of the President, His Excellency, Harry S. Truman, on January 31, 1946, and functioning and doing business in the state and district aforesaid, and it is also, and has been such since the said executive order, an agency and branch of the other defendant, Reconstruction Finance Corporation.

III.

That at one time, and throughout the year 1941, Metals Reserve Company, was, and until January 30, 1945, continued to be a corporation [3*] organized and existing under and by virtue of the laws of the United States, and doing business in the State and District of Montana.

IV.

That the plaintiff, May Paula Mouat, is the trustee of an express contract trust, evidenced by a written instrument, a declaration of trust of date on or about December 13, 1941, and she is trustee under said written trust for M. W. Mouat, J. G. Link, Martha M. Link, O. F. Goddard, R. L. Duba, Celia Duba, H. E. Duba, Opal Duba, J. J. Mouat Jr., Helen Mouat, R. F. Adam, Susie C. Rohder, Frederick Rohder, P. A. DeLannoy, Margaret DeLanoy, Lillian Duba Wittman, W. C. DeLannoy, Lois E. DeLannoy, Charles L. Buck, Geneva Buck, Glen S. Buck, E. A. Rowe, Florence E. Rowe, Charles S. Ridley, William D. Jones and Edith M. Jones.

* Page numbering appearing at bottom of page of original certified Transcript of Record.

V.

That the plaintiffs are each and every one of them citizens of the State of Montana, residents in the district aforesaid, and in the Billings Division.

VI.

That on or about the 20th day of December, 1941, in the State of Montana, Metals Reserve Company aforesaid and the plaintiffs aforesaid, for mutual considerations of value proceeding each to the other, did make, execute and deliver between themselves a certain contract in writing, a mining lease, wherein the plaintiffs were lessors and Metals Reserve Company, then existing, was lessee. There is annexed to this complaint and made a part hereof a true and exact copy of the said mining lease, marked Exhibit A, and this is done with the same intent, force and effect as if the said written contract were set out here in the body of the complaint.

VII.

That the said written contract, Exhibit A, existed between Metals Reserve Company and these plaintiffs until June 30, 1945; upon such date, by statute duly enacted by the Congress of the United States, all of the assets of Metals Reserve Company, including [4] the said lease, Exhibit A, and rights thereunder, were transferred to defendant Reconstruction Finance Corporation, and likewise on said June 30, 1945, by similar Act of Congress of the United States, all of the liabilities existing against Metals Reserve Company were made liabilities of Recon-

struction Finance Corporation, and it by law assumed all liabilities of the said Metals Reserve Company on said date; and particularly there was included in such Act of Congress the rights of Metals Reserve Company in and to Exhibit A, and said Reconstruction Finance Corporation was made liable to perform all of the obligations in said Exhibit A binding on Metals Reserve Company as lessee, and on said day Reconstruction Finance Corporation actually became the assignee of the lessee's interest in the said lease, and until this date said Reconstruction Finance Corporation remains the assignee and actual lessee under Exhibit A, and liable for the faithful performance of all the obligations in said Exhibit A originally binding on Metals Reserve Company.

VIII.

And since the creation by executive order of War Assets Administration the defendant War Assets Administration has been at all times liable for and by law compelled to observe as an agency of Reconstruction Finance Corporation all of the obligations in Exhibit A on the lessee therein binding.

IX.

That on November 15, 1945, Reconstruction Finance Corporation, a defendant, duly gave by mail to the plaintiffs at Columbus, Montana, a certain notice in writing of termination of and cancellation of the said lease, Exhibit A, which was to take effect February 28, 1946; that such notice is in words and figures as follows:

“Reconstruction Finance Corporation

Office of Metals Reserve

Registered Mail —

Return Receipt Requested

Washington 25, D. C.

Nov. 15, 1945.

Mrs. May Paula Mouat, Mr. M. W. Mouat
and Mrs. May Paula Mouat, as Trustee,
Columbus, Montana

Dear Mr. and Mrs. Moaut:

Pursuant to Public Law 109, 79th Congress, approved June 30, 1945, Metals Reserve Company was dissolved effective July 1, 1945, [5] and all of its functions, powers, duties and authority, together with its documents, books of account, records, assets and liabilities of every kind and nature were transferred to Reconstruction Finance Corporation to be performed, exercised and administered by Reconstruction Finance Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation.

Under date of November 2, 1945, the War Production Board wrote us that the operation by us of the properties covered by the lease from you dated December 20, 1941, is not required to satisfy either military or civilian demands. Therefore, Reconstruction Finance Corporation hereby gives notice of its intention to surrender, terminate and cancel and does hereby surrender, terminate and cancel

that certain lease dated the 20th day of December, 1941, covering certain mining property in Stillwater County, Montana, wherein you are Lessors and Metals Reserve Company is Lessee, said surrender, termination and cancellation to be and become effective on February 28, 1946.

As provided in paragraph 14 of the lease, we are making payment of the sum of \$1,000 to The Yellowstone Bank, Columbus, Montana, for payment by said Bank to Mrs. May Paula Mouat, as Trustee. Enclosed is a copy of our letter to The Yellowstone Bank.

For your information, please be advised that we are also cancelling our lease from Dr. Edward Sampson.

Very truly yours,

RECONSTRUCTION FINANCE
CORPORATION,

By MORRIS LEVINSON,

Executive Director

Office of Metals Reserve.”

X.

That Metals Reserve Company, before the Congress transferred to the Reconstruction Finance Corporation all of the rights of the lessee under Exhibit A, breached and failed to keep an obligation of the said lease on it then binding, to-wit: as appears in paragraph 7 of the said lease, Metals Reserve Company agreed to pay throughout the term of the lease a minimum royalty of Ten Thousand Dollars (\$10,000) per year, payable quarterly,

on or before thirty (30) days after the end of each calendar quarter; that Metals Reserve Company failed entirely to pay and there was never paid to The Yellowstone Bank at Columbus, Montana, for May Paula Mouat as Trustee any sum at all of the said \$10,000 per year payable quarterly until or at all before or at all after February 28, 1946, as the date of the cancellation and end of the said lease (Exhibit A), and the defendant Reconstruction Finance Corporation is indebted to the plaintiff May Paula Mouat as Trustee in the amount of Ten Thousand Dollars (\$10,000) for the year 1943; Ten Thousand Dollars (\$10,000.) for the year 1944; Ten Thousand Dollars (\$10,000.) for the year 1945, and one-sixth of Ten Thousand Dollars (\$10,000.), to-wit: One Thousand Six Hundred Sixty-Six and 66/100 Dollars (\$1,666.66) [6] for the two months' period in the year 1946, making in all the sum of Thirty One Thousand Six Hundred Sixty Six and 66/100 Dollars (\$31,666.66), no part of which has ever been paid.

XI.

And further, the defendants, and both of them, have broken and failed to keep the terms of said Exhibit A; in Exhibit A the lessee did promise that when for any cause the lease shall terminate, "the lessee shall deliver to lessors a proper release or certificate of that fact, duly executed and acknowledged, and lessors upon such termination, and after compliance (complaince) with all of the terms, covenants and conditions of this lease, shall

execute and deliver to lessee a release and discharge from all further liability hereunder;" that by virtue of the notice of date November 15, 1945, hereinbefore set out, the lease terminated on February 28, 1946, but neither Metals Reserve Company, nor either of the defendants, nor anyone, has delivered any proper release or any release or certificate to that effect acknowledged or executed so that it may be recorded, and thereby clear the title of this cloud by virtue of Exhibit A, and the plaintiffs' title to said premises described in Exhibit A should be quieted and set at rest from any claim under the said lease, Exhibit A.

XII.

That the contract, Exhibit A, provided that "upon the termination of this lease by either party lessee shall surrender peaceably the leased premises and appurtenances in good order, with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and the lessors shall have the right to reenter upon the said leased premises owned by them, and appurtenances, and take full and complete possession of the whole thereof," but at no time since the 28th day of February, 1946, or before such date, have the defendants, or either of them, surrendered peaceable possession of the premises or any part thereof to the plaintiffs or to either of them; the defendants, [7] acting through servants whose names are unknown to these plaintiffs, have caused the front gate to the said prem-

ises to be manned by armed guards day and night; such guards have repeatedly forbidden the plaintiffs to enter the said premises without procuring a written pass, and such guards have ordered the plaintiffs, when leave was requested to enter by plaintiffs, not to enter within a fence surrounding a large part of the said premises and surrounding all of the improvements thereon, and when permission has been given to the plaintiff M. W. Mouat to enter he has been followed by guards, and by a sign forbidden to take within his own property described in the lease either a gun or camera. The plaintiffs have demanded possession of the said property on August 28, 1946, to take effect on and after midnight of August 28, 1946, and such demand has been refused by defendants and by their armed guards placed on the property described in Exhibit A. That the plaintiffs should be given by judgment of the Court peaceable possession and continuous possession of all of the property described in Exhibit A.

That the defendants have further broken and failed to keep the terms on them binding of the said Exhibit A. The defendants agreed to surrender the leased premises and appurtenances in good order upon the termination of Exhibit A. That at the time of the termination of Exhibit A, towit: February 28, 1946, there were seventy-nine (79) separate residence buildings and one store building and one company barracks building, all fitted with modern plumbing fixtures and appli-

ances. That the defendants, at exact times unknown to plaintiffs, but between the 28th day of February, 1946, and the date of filing this complaint, have committed waste upon the said premises, and they have by means of servants and mechanics direct, or by contract with others, dismantled and removed all of the plumbing from the said buildings, though the same was all affixed to the real estate and a part of the said buildings. That the defendants have carried away and converted to their own use all of the said plumbing fixtures [8] and materials composing the same. That the said fixtures and plumbing articles taken from each of the said residence buildings was worth the sum of Five Hundred Dollars (\$500.00), and the whole thereof was worth the sum of Thirty Nine Thousand Five Hundred Dollars (\$39,500.00) taken from the said residence buildings. That the fixtures taken from the said barracks by the defendants were and are reasonably worth the sum of Fifteen Hundred Dollars (\$1,500.00) and by reason of such acts of the defendants in forcibly removing and carrying off and converting to their own use the said plumbing and fixtures the defendants have committed damage and detriment to the appurtenances and to the property described in the lease in the sum of Forty One Thousand Dollars (\$41,000.00), no part of which has ever been paid.

XIII.

That the defendants have completely dismantled twenty-two of the residence buildings on the said

land described in the lease since February 28, 1946, and have piled the lumber in a salvage pile, and threatened to, and unless enjoined by a judgment of the Court will completely demolish and move every one of the said buildings upon the said demised premises; that each of the said buildings already demolished by the defendants was, even after the plumbing was removed, of the value of Six Hundred Dollars (\$600.00).

XIV.

That on February 28, and March 1, 1946, there remained on premises demised in the said lease, Exhibit A, a vast number of tools, much personal property, electrically run refrigerators, and other property, and rails for mining and pipes for mining, wrenches, caps, spigots, bolts, nuts, and other personal property, and that much of the same remained on the property demised for a period of more than six months, to-wit: on August 29, 1946, there remained on the said premises a vast deal of such personal property, not only that particularly described but other kinds; that the lessees, now the defendants above named, did in the said lease, Exhibit A, agree as follows: "That unless there is an understanding to the contrary in [9] writing, anything remaining on the premises herein demised and leased upon the termination thereof for a period of more than six months after such termination shall conclusively be deemed to have been abandoned by the lessee in favor of the lessors;" that the lessees, now these defendants, have kept

an exact, careful inventory of all property removed from the said premises since August 29, 1946; that plaintiffs by reason of being excluded forcibly from the said property by the defendants are unable to tell and do not know and have no means of knowledge or information as to how much the defendants have removed of such things remaining on the said premises after August 28, 1946; that the defendants should be required to account for whatever was taken by them from the said premises since the 28th day of August, 1946. Plaintiffs are informed and believe that the amount of such property so taken from the said premises by the defendants and converted to their own use since August 28, 1946, is of the value of more than Ten Thousand Dollars (\$10,000.00), and all of said property has been converted to the defendants' use against the wish and consent of the plaintiffs, or any of them.

Wherefore, plaintiffs pray for judgment against the defendants;

1. For the sum of Thirty One Thousand Six Hundred Sixty Six and 66/100 Dollars (\$31,666.66) for rents as aforesaid;

2. And for the sum of Forty One Thousand Dollars (\$41,000.) for waste as to the removal and conversion of the plumbing fixtures;

3. And for the sum of Six Hundred Dollars (\$600.00) each for the destruction of twenty-two residence buildings;

4. That the defendants be ejected from the said lands described in Exhibit A, and from all thereof, and that plaintiffs be put in possession of all of the said lands;

5. That the defendants be enjoined from committing any further waste upon the said property or upon any thereof.

6. That an order be made requiring the defendants to account and file a written list and inventory of all property taken from the said premises by them since the 28th day of August, 1946, and that judgment be entered for the value of all such property against the defendants and in favor of the plaintiffs;

7. And for such other and further relief as to the Court may seem meet and equitable, and for costs of suit.

LOWNDES MAURY,
Attorney for Plaintiffs,
THOMAS C. COLTON,
A. G. SHONE,
Attorneys for Plaintiffs.

EXHIBIT A

Mining Lease

This Agreement, made and entered into, in duplicate, this 20th day of December, 1941, by and between May Paula Mouat and M. W. Mouat, wife and husband and May Paula Mouat, as Trustee, of Nye, Stillwater County, Montana, parties of the first

Exhibit A—(Continued)

part, hereinafter called Lessors and Metals Reserve Company, a corporation organized and existing under the laws of the United States, party of the second part, hereinafter called, Lessee,

Witnesseth:

The Lessors, in consideration of the sum of One Dollar (\$1.00), lawful money of the United States of America, to them in hand paid by the Lessee, the receipt and sufficiency whereof is hereby acknowledged, and in further consideration of the covenants and the considerations herein contained and to be kept, performed and observed by the Lessee, do hereby lease, demise and let unto the Lessee, its successors and assigns, for the term of ten (10) years from and after the date hereof, all that certain property described as follows:

Those certain patented quartz lode mining claims situated in Twp. 5 So., Range 15E., M.P.M., in Stillwater County, Montana, known and described as:

Bald Eagle—U.S. Lot No. 69-D,
Mountain View—U.S. Lot No. 63-A,
Rough Rock—U.S. Lot No. 63-B.

Also, all those certain unpatented quartz lode mining claims situated in Twp. 5 So., Range 15E., M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Stillwater County, Montana, in the records of the said county on the dates and in the respective books and on the respective pages, as follows:

Exhibit A—(Continued)

Name	Date Cert. Recorded	Book	Page
Adam	July 19, 1941	24 Misc.	207
Prinetons	May 8, 1941	24 Misc.	122
Skunk	May 8, 1941	24 Misc.	128
Sampson	May 8, 1941	24 Misc.	126
Oldeo	May 8, 1941	24 Misc.	124
Link	July 19, 1941	24 Misc.	209
Pete	July 11, 1918	7 Misc.	122
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	288
Scully	July 11, 1918	7 Misc.	122
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	286
Denver	Oct. 7, 1918	7 Misc.	233
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	291
Old Lady	July 11, 1918	7 Misc.	114
Westlake	July 11, 1918	7 Misc.	116
Billie	Oct. 17, 1918	7 Misc.	242
Chas. F.	July 11, 1918	7 Misc.	118
(Amended Cert.)			
Old Lady	Oct. 17, 1941	24 Misc.	289
Chas. F.—Continued:			
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	287
Gap	July 31, 1941	24 Misc.	219
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	290
Jame	Oct. 3, 1941	24 Misc.	271
Soup	Oct. 3, 1941	24 Misc.	273
Pine	Oct. 2, 1919	8 Misc.	167

Also, all those certain unpatented quartz lode mining claims situated in Twp. 5 So., Range 15E., M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Park County, Montana, in the records of the said county on the dates

Exhibit A—(Continued)

and in the respective books and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Smelter	Sept. 23, 1887	Vol. 1 Quarts Locations	25
Smelter	June 8, 1889	Vol. 1 Quarts Locations	420

Also, that certain unpatented placer mining claim and that certain unpatented tunnel site situated in Twp. 5 So., Range 15E., M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Stillwater County, Montana, in the records of the said county on the dates and in the respective books and on the respective pages as follows:

Name	Date Cert. Recorded	Book	Page
Lake Placer	July 16, 1940	23 Misc.	400
(Amended Cert.).....	June 16, 1941	24 Misc.	155
Monte Alto Tunnel and Tunnel Site	Aug. 13, 1918	7 Misc.	159

Also, all of the right, title and interest of said Lessors now owned or which may be hereafter acquired, in and to those certain unpatented quartz lode mining claims situated in Twp. 5 So., Range 15E., M.P.M., Stillwater County, Montana, the certificates of locations of which were recorded in the office of the County Clerk and Recorder of said Stillwater County, Montana, in the records of said county on the respective dates and in the books and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Mountain View Chrome Co. #1	Sept. 22, 1939	23 Misc.	43
Mountain View Chrome Co. #2	Aug. 31, 1940	23 Misc.	434

Exhibit A—(Continued)

Also, all water and water rights, ditch and ditch rights, flumes, easements, rights-of-way, permits from United States Forest Service, buildings and improvements upon or used, or for use, in connection with the above-described premises.

To Have and to Hold said mining claims and property unto the Lessee, its successors and assigns to the exclusion of all others claiming under or through the Lessors herein, for the term of ten (10) years from the date hereof, and subject to termination as hereinafter specified.

In consideration of the premises, it is hereby covenanted and agreed by and between the parties hereto as follows:

1. Lessee shall have the right to explore, mine and extract and remove from said leased mining claims chromite or other chromium bearing ores and any other minerals, metals, precious stones or rocks found in, on or under said leased premises, together with the right, during the continuance of this lease, to take and use any materials suitable for back-filling or other mining purposes and any limestone [13] found on the premises, together with the right to construct all mills, plants, tracks, tramways, roads, buildings and other improvements; and to make all excavations, openings, tunnels, ditches, drains, and other improvements upon said leased premises, which are, or may become necessary or suitable for the mining and removing of chromite or other ores, metals, minerals, rocks and precious stones, the milling and concentrating of the same

Exhibit A—(Continued)

and the processing of such ores, metals, minerals and other materials or the concentrates thereof, and the right, during the continuance of this lease, to cut and use timber and other raw materials found upon or in said premises for any purpose in connection with the operations to be carried on under this Lease, subject only to the exploration contracts between the Lessors and the United States Bureau of Mines of record in the office of the County Clerk and Recorder of Stillwater County, Montana, and in the office of the County Clerk and Recorder of Sweetgrass County, Montana.

2. On or before February 1st, 1942, the sum of Ten Thousand (\$10,000.00) Dollars is to be paid as advance royalty under the terms of this Lease by the Lessee to The Yellowstone Bank, Columbus, Montana, to the credit of May Paula Mouat, as Trustee, for the owners of the property as their interests may appear. This paragraph is specifically subject to the right and option hereinafter contained of the Lessee to make this payment as above set forth or to terminate this Lease by failing to make such payment.

3. The Lessee agrees to pay, during the term of this Lease, a royalty of three and fifty-seven one-hundredths cents (3.57c) per unit of chromic oxide (Cr_2O_3) dry basis (20 pounds of chromic oxide to constitute a unit) contained in the concentrates produced or processed from the chromite ore mined from the hereinabove described mining claims, and on all chromite ore which the Lessee mines from

Exhibit A—(Continued)

said leased premises and sells, ships or permits to be shipped without concentration or processing, the Lessee agrees to pay a royalty of three and twenty-one one-hundredths cents (3.21c) per unit (20 pounds of chromic oxide to constitute a unit) of contained chromic oxide (Cr_2O_3) in the ore dry basis. For any other minerals or metals found in or precious stones found in and mined and removed from said leased premises Lessee agrees to pay 10% of the net smelter or other returns for the minerals and in the case of precious stones 10% of the net sales return therefor. There shall be no royalty payable on any material used for back-filling or other mining purposes, or on any limestone used, nor shall any royalty be paid on any materials taken from the said leased premises used in connection with the development and operation of the mine and the construction and operation of the mill, or the construction and operation of any of the facilities used in connection with the operation of said leased premises. Provided, however, anything in this lease to the contrary notwithstanding, any and all royalty payable on products mined or produced from aforesaid quartz lode mining claims, Mountain View Chrome Co. #1 and Mountain View Chrome Co. #2, shall be paid to and deposited with a bank or trust company nominated by Lessee and satisfactory to Lessor's to be held in trust by said bank or trust company pending full settlement of any and all disputes over title to said mining claims, and upon full settlement of such disputes to be paid

Exhibit A—(Continued)

by said bank or trust company to the person or persons, determined by law or agreement, to be entitled thereto. Any and all charges or fees of said bank or trust company arising out of such payment and deposit together with any and all taxes thereon, shall be deducted from the moneys so paid to and held on deposit by said bank or trust company, provided further, that upon payment of such royalties into said bank or trust company, [14] as above provided, the Lessee shall be relieved and discharged of any further obligation or liability in reference to said royalties or the distribution thereof among the persons entitled thereto; and provided, further, in the event of dispute respecting the mining claim or property from which any ore or product shall have been produced, mined or extracted, Metals Reserve Company, or any United States Government Agency assignee shall settle and determine any and all such dispute or disputes and such settlement and determination by Metals Reserve Company, or any United States Government Agency, Assignee, shall be final and conclusive.

4. For the purpose of convenience, each calendar year shall be divided into quarters. The first quarter shall be from January 1 to March 31, both dates inclusive; the second quarter shall be from April 1 to June 30, both dates inclusive; the third quarter shall be from July 1 to September 30, both dates inclusive, and the fourth quarter shall be from October 1 to December 31, both dates inclusive.

5. Except as otherwise provided in paragraph

Exhibit A—(Continued)

three herein above, Lessee shall pay all royalties due and payable hereunder in lawful money of the United States on the 30th day following each calendar quarter, which payment shall be deposited with The Yellowstone Bank at Columbus, Montana, to be paid by said Bank to May Paula Mouat, as Trustee. Lessee shall have the right to maintain a stock pile of chromite ore on or near the herein demised premises without paying royalties thereon until concentrated. All payments of royalty made shall be the amount due as royalties, less taxes on such royalties which the smelter or Lessee is by law obligated to deduct from same.

6. Lessee agrees to make, or cause to be made, a fair estimate of the number of tons of ore mined from the said leased premises, and to make, or cause to be made a record of the disposition of same in the tonnage stockpiled, sold or shipped or permitted to be shipped without concentration, and to make or cause to be made, an accurate assay of the heads of such ore going into said mill for concentration, to accurately weigh, or cause to be weighed, the number of tons of chromite concentrates produced from said leased premises, and to make or cause to be made an accurate assay of the average samples of all such chromite concentrates produced and to make or cause to be made an accurate assay of the tailings resulting from the production of such concentrates, and to make, or cause to be made an accurate record of all the aforesaid weights and assays.

Exhibit A—(Continued)

Lessee, at the time of making payments for royalties, shall at the same time render and transmit to the Lessors a true and exact copy of all of the aforesaid estimates, weights, and assays verified after audit by a responsible officer or representative of the Lessee, in duplicate, and true copies of the smelter or other returns for other minerals and precious stones mined or removed from said leased premises. The right is reserved by the Lessors, and conceded by the Lessee, to inspect, review and test the correctness of the scales used in weighing ores and concentrates and to assay said ore, concentrates and tailings at any time, and in such manner as the Lessors may elect, but not in such manner that it will interfere with the operations of Lessee, it being understood that any errors in these respects, when established, shall be corrected in the accounts of the parties hereto.

7. Beginning January 1, 1943, and thereafter during the term of this lease, Lessee agrees to pay to and deposit with The Yellowstone Bank at Columbus, Montana, to be paid by said Bank to May Paula Mouat, as Trustee, a minimum royalty of Ten Thousand Dollars (\$10,000.00) per year payable quarterly on or before thirty days after the end of each calendar quarter. In the event that the total royalties payable under Paragraph 3 hereof, (exclusive of royalties payable on products mined or produced from aforesaid Mountain View Chrome Co. #1 and Mountain View Chrome #2 mining claims

Exhibit A—(Continued)

and paid to a bank or trust company in trust as in said Paragraph 3 provided) during any calendar year shall equal or exceed Ten Thousand Dollars (\$10,000.00) this minimum royalty obligation shall be fully complied with. Royalty paid in any minimum royalty year in excess of Ten Thousand Dollars (\$10,000.00) cannot be credited to the payment of any royalty accruing in any other minimum royalty year but any royalty paid in any quarter of a minimum royalty year by reason of minimum royalty requirements which is in excess of the earned royalties for that quarter may be applied in payment of earned royalties in any other quarter of such minimum royalty year; provided, however, should Lessee's construction or development or mining or milling operations or any other operation hereunder be suspended because of any of the causes or reasons set forth in Paragraph 24 hereof Lessee's obligation to pay a minimum royalty as aforesaid shall be suspended during any and all periods where such causes or reasons exist and the obligation to pay such minimum royalty shall be reduced in such proportion as the period of suspension of operations bears to the entire calendar year.

8. From and after January 1, 1942, Lessee agrees to pay prior to delinquency all taxes, general and special, upon the lands and properties herein leased or held or used under the terms of this Lease and the improvements thereon and on the ore and/or concentrates produced therefrom,

Exhibit A—(Continued)

including the metal mines tax, license taxes, and any and all other taxes that may be levied against said mines and all properties herein leased or held or used under the terms hereof, and on the products produced therefrom whether it be ore or products of ore, by virtue of any law now existing, or which may hereafter be enacted by the Government of the United States or the State of Montana, except the Lessors shall pay all taxes assessed and levied on their royalty.

9. Lessee agrees to carry on its operations hereunder, diligently and in a good, efficient and miner-like manner and in accordance with accepted mining practices in the State of Montana, and Lessee agrees that all mining operations shall be carried on in a systematic, orderly and economical manner so as to realize in so far as is practicable, the full ore resources of the leased premises. Lessee shall have the option, upon one month's notice to Lessors, of electing to abandon any specified area and may so abandon, leaving to Lessors the option of maintaining the timbering and trackage of said area at Lessors' own expense and without interfering with the operation of Lessee.

10. The representatives of the Lessors shall have free access to the premises and to Lessee's mill for the purpose of inspecting, sampling and examining, and shall have the right to examine the records referred to in Paragraph 6 hereof, but without interfering with or hindering the operations of the Les-

Exhibit A—(Continued)

see; provided, however, that Lessors shall carry or cause to be carried workmen's compensation insurance on their employees to be effective at all times when such employees are on said leased premises or any other premises of Lessee. Lessee shall keep or cause to be kept accurate maps of the mine workings in plan and longitudinal sections showing all working and the areas stoped out, together with accurate record of all samples taken (with description of location, and assay content of each) from ore, concentrates and tailings; such maps and sample records to be available [16] to Lessors' representatives for examination and copying.

11. Lessee shall assume all responsibility for its operations and shall save Lessors harmless for damages caused by Lessee, its employees, or contractors to the persons or property of others, except to the persons or property of employees of Lessors. The Lessee shall carry at its own expense or cause to be carried without cost to Lessors workmen's compensation insurance on its employees who are covered by the Workmen's Compensation Law of the State of Montana or Lessee shall make other arrangements for workmen's compensation as may be permitted by such law.

12. Lessee agrees to furnish at its own cost and expense or cause to be furnished without cost to Lessors, all labor, materials and supplies necessary for the operation of the hereinabove described leased property during the term of this lease except

Exhibit A—(Continued)

for materials taken from the said leased property hereinabove mentioned that may be used without pay, and to fully pay when due for all machinery, equipment and materials joined or affixed to the hereinabove described property, and to pay in full when due all persons who perform labor upon the hereinabove described leased property, and agrees that it will defend the said leased property and save Lessors harmless against all liens of any kind or nature placed on said leased property for any work done or machinery, equipment or materials furnished thereon during the term of this Lease provided Lessee shall not be held responsible for any liens created by Lessors on the said demised premises.

13. Lessors shall have no right to cancel or terminate this Lease except by reason of the failure of Lessee to pay taxes or royalties. If dispute arises as to the amount due and payable for royalties by Lessee, the amount not in dispute shall be paid and the disputed amount shall be determined with all due diligence, and on final determination shall be promptly paid, or default shall be deemed to have been made. If default is made in the payment in any of the aforesaid obligations of Lessee, then Lessors may serve notice on Lessee demanding that payment be made within thirty days, and if payment is not made and the default remedied within thirty days after receipt of said notice by Lessee, Lessors may forthwith declare this lease terminated and ended and the Lessors shall then

Exhibit A—(Continued)

be entitled immediately to re-enter and take possession of the demised premises and Lessee shall, nevertheless, make and comply with all obligations and payment for the maintenance of the demised premises and possessory rights, claims and permits up to the said time of re-entry by Lessors, as is provided by Paragraph 15 hereof.

14. The Lessee may at any time, after January 1, 1942, on ninety days' notice to Lessors and by the payment of the sum of One Thousand Dollars (\$1,000.00), surrender and terminate this Lease, provided that, promptly after such termination, Lessee shall pay all royalties, if any, accrued up to the effective date of such termination, any guaranteed minimum royalty payable to be pro-rated up to the date of such termination and no royalties shall accrue after the date of such termination, said payments to be made to The Yellowstone Bank, Columbus, Montana, and to be paid by said Bank to aforesaid Trustee.

15. Upon the termination of this Lease by either party, Lessee shall surrender peaceably the leased premises and appurtenances in good order with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and the Lessors shall have the right to re-enter upon said leased premises owned by them and appurtenances and take full and complete possession of the whole thereof. Upon the expiration of this Lease or the termination of

Exhibit A—(Continued)

this Lease for any reason by [17] either party, Lessee shall have six (6) months' additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings erected upon the demised premises and ore on dumps upon which royalties have not been paid.

16. When this Lease, for any cause, shall terminate, the Lessee shall deliver to Lessors a proper release or certificate of that fact, duly executed and acknowledged, and Lessors, upon such termination, and after compliance with all of the terms, covenants and conditions of this Lease, shall execute and deliver to Lessee a release and discharge from all further liability hereunder.

17. Time is of the essence of this Agreement and all of the grants, terms and covenants, stipulations and conditions expressed herein shall run with the land and in all respects shall extend to and be binding upon the successors and assigns of the parties hereto.

18. It is mutually agreed that this Lease is a Montana contract and shall be interpreted and construed under and by the laws of the State of Montana.

19. It is agreed that wherever the words "chromic oxide" are used herein they shall be construed

Exhibit A—(Continued)

to mean chromium sesquioxide, the chemical symbol for which is Cr_2O_3 .

20. Lessee agrees with the Lessors that unless there is an understanding to the contrary in writing, anything remaining on the premises herein demised and leased upon the termination hereof, for a period of more than six months after such termination, shall conclusively be deemed to have been abandoned by the Lessee in favor of the Lessors.

21. Nothing herein contained shall restrict or be deemed to restrict the right of Lessee to assign this Lease.

22. Promptly upon receipt of Lessee's written request, Lessors will execute and deliver to Lessee a quit claim deed to all of Lessors' right, title and interest in and to property not to exceed 200 acres, to be designated by Lessee for use by Lessee for millsites, townsites, stock piling and tailings disposal.

23. It is expressly agreed that Lessee may use its plant facilities for the smelting, beneficiating, concentrating and milling of chromite ore or any other ore, metal, mineral or material produced from mining properties other than the premises covered by this Lease without payments of any royalty to the Lessors.

24. Anything in this Lease contained to the contrary notwithstanding, any strike, lockout, difference with workmen, accident, fire, explosion, flood,

Exhibit A—(Continued)

earthquake, embargo, mobilization, war, foreign war, hostility, riot, requirement, regulation, restriction or other act of any government or governments, whether legal or otherwise, acts of public enemies, the elements, force majeure, inability to secure or delay in securing cars, labor, raw materials, fuel or other supplies or material or electric power necessary for the operation of the leased premises or the operation of Lessee's facilities, failure of the ore supply or loss of the ore body in the said leased premises or inability to secure sufficient ore of the grade required for concentrating from the said leased premises, unforeseen metallurgical or milling delays, delays or interruptions [18] in transportation by rail, water or otherwise, damage to or destruction of such mines or plants or other operating facilities and any other contingency, whether or not of the nature or character hereinbefore specifically enumerated, which is beyond the control of Lessee or which delays or interferes with the performance of this agreement, shall be considered sufficient justification for delay in such performance until such cause ceases to exist.

25. Any notice herein mentioned to be given by the Lessee to the Lessors shall be sent by registered mail addressed to the Lessors at Columbus, Montana. Any notice herein mentioned to be given by the Lessors to the Lessee shall be in writing and shall be sent by registered mail to the office of the Lessee at 811 Vermont Avenue, Northwest, Washington, D. C.

Exhibit A—(Continued)

26. This lease is executed in duplicate, either counterpart of which, for all purposes, may be used as an original.

27. However, should the exploration work now being done on the leased properties by the United States Bureau of Mines reveal nickel ore bodies of commercial value and should the Lessee decide not to mine such nickel ores, and pay royalties as set forth in Paragraph 3, then Lessors shall have the right to mine or assign the right to mine such nickel ores, provided, however, that such mining does not in any way interfere with the Lessee's mining, milling or smelting operations of any other ores under this Lease. Provided, further, that Lessee has the exclusive right to mine all chrome ores, and in case of dispute as to whether the ore is chrome or nickel it is expressly agreed that such disputed ore shall be for the purpose this Lease considered chrome ore.

28. Lessee, or its assigns, may renew this lease for an additional period of ten (10) years upon the same terms and conditions, by giving Lessors notice in writing at least thirty (30) days prior to the expiration of this Lease.

29. Lessee may at any time during the existence of this agreement do any exploration work Lessee deems necessary, provided that any ore extracted before the payment of the advance royalty set forth in Paragraph 2 must not be removed from the

Exhibit A—(Continued)

property, except such ores that must necessarily be removed from the property for sampling and mill testing.

30. If Lessee fails to pay the advance royalty provided for in Paragraph 2 of the Agreement then this Lease Agreement is automatically terminated and at an end, and Lessors and Lessee relieved from any and all obligations or liabilities under this Agreement.

31. Lessors warrant their title to and will defend the Lessee in the quiet and peaceful possession of said premises and mining claims against all persons, except that Lessors make no warranty as to their title to mining claims Mountain View Chrome Co. No. 1, Mountain View Chrome Co. No. 2 and the two Smelter claims, and will pay any and all liens now on any and all said leased premises and any and all taxes which accrued or were payable prior to January 1, 1942, and in the event that Lessors shall fail to pay said liens or taxes, the Lessee may pay the same and shall have a lien on the rents and royalties for reimbursement.

In Witness Whereof, Lessors have hereunto set their hands and seals and the Lessee has caused these presents to be executed by its officers thereunto duly authorized and its seal affixed hereto the day and year hereinabove first written.

Exhibit A—(Continued)

/s/ MAY PAULA MOUAT,

/s/ M. W. MOUAT. [19]

/s/ MAY PAULA MOUAT,

Trustee.

Lessors:

METAL RESERVE COMPANY,

A Corporation.

By /s/ G. TEMPLE BRIDGMAN,

Vice President.

Lessee:

[Corporate Seal]

Attest:

/s/ M. C. MULLIGAN,

Its Secretary.

State of Montana,

County of Stillwater—ss.

On this 20th day of December, 1941, before me, the undersigned, a Notary Public in and for the State of Montana, personally appeared May Paula Mouat, known to me to be the person whose name is subscribed to the within and foregoing instrument as an individual and as Trustee, and acknowledged to me that she executed the same as an individual and as Trustee.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year in this certificate first above written.

[Seal] /s/ H. L. MYERS,

Notary Public for the State of Montana, Residing
at Billings, Montana.

My Commission expires Febr. 4, 1944.

Exhibit A—(Continued)

State of Montana,
County of Stillwater—ss.

On this 20th day of December, in the year 1941, before me, H. L. Myers, a Notary Public in and for the State of Montana, personally appeared M. W. Mouat, known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year in this certificate first above written.

[Seal] /s/ H. L. MYERS,
Notary Public for the State of Montana, Residing
at Billings, Montana.

My Commission expires Febr. 4, 1944. [20]

District of Columbia—ss.

On this 12th day of January, 1942, before me, Charles J. Buettner, a Notary Public in and for the District of Columbia, personally appeared G. Temple Bridgman, personally known to me to be the Vice President of Metals Reserve Company, the corporation that executed the within and foregoing instrument and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year in this certificate above written.

[Seal] /s/ CHARLES J. BUETTNER,
Notary Public for the District
of Columbia.

My Commission expires Mar. 14, 1946.

[Endorsed]: Filed Sept. 17, 1946. [21]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant, War Assets Administration, an agency of the United States Government, and appearing specially moves this Honorable Court to dismiss the plaintiffs' complaint on file herein as to the War Assets Administration, an agency of the United States of America, upon the grounds and reasons therefore as follows:

I.

That the War Assets Administration is only an executive agency of the United States, and is not subject to suit.

JOHN B. TANSIL,
Attorney of the United States, in and for the District of Montana.

MERLE C. GROENE,
Assistant Attorney of the United States, in and for the District of Montana, Attorneys for the Defendant.

[Endorsed]: Filed Nov. 12, 1946. [23]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, RECONSTRUCTION
FINANCE CORPORATION

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

I.

Defendant admits the allegations in paragraph I of the complaint.

II.

Defendant admits the War Assets Administration is an executive agency of the United States established under Executive Order No. 9689, dated January 31, 1946. Defendant denies that War Assets Administration is an agency or branch of the Reconstruction Finance Corporation.

III.

Defendant admits the allegations in paragraph III of the complaint. Defendant says that Metals Reserve Company was a corporation created by defendant on June 28, 1940, pursuant to section 5(d) of the Reconstruction Finance Corporation Act as amended, 47 Stat. 5, to aid in the national defense program.

IV.

Defendant admits that plaintiff, May Paula Mouat, was at one time named a trustee of an ex-

press trust for the benefit [25] of certain mining claimants but defendant is without information sufficient to form a belief with respect to the present existence of said trust or the exact beneficiaries.

V.

Defendant admits the allegations in paragraph V of the complaint.

VI.

Defendant admits the allegations in paragraph VI of the complaint.

VII.

Defendant admits that by Act of Congress dated June 30, 1945, 59 Stat. 310, Metals Reserve Company was dissolved and all of its assets, duties, liabilities, etc., were transferred to Reconstruction Finance Corporation. Defendant says that the extent of its liability on the matters involved in the lease referred to in the complaint is a question of law.

VIII.

Defendant denies that War Assets Administration is an agency of Reconstruction Finance Corporation. Defendant says that the remaining allegations in paragraph VIII of the complaint are conclusions of law.

IX.

Defendant admits the allegations in paragraph IX of the complaint. Defendant alleges that the sum of \$1,000 was duly deposited in the Yellowstone Bank, Columbus, Montana, for the benefit of Mrs. May Paula Mouat, Trustee, in accord-

ance with the provisions of paragraph 14 of the lease.

X.

Defendant denies the allegations in paragraph X of the complaint. Defendant alleges that all minimum royalties or other royalties that accrued under the lease have been paid as follows:

(a) On January 23, 1942, Metals Reserve Company paid to the Yellowstone Bank of Columbus, Montana, to the credit of May Paula Mouat, Trustee, the sum of \$10,000 as an advance royalty pursuant to [26] paragraph 2 of the lease;

(b) As a result of mining and milling activities during the year 1943, prior to suspension thereof by order of the War Production Board, the sum of \$40,920.21 in earned royalties was paid as provided under the terms of the lease. Of the total amount paid, the sum of \$19,428.92 was paid by reason of production from claims included in the lease other than Mountain View Chrome No. 1 and 2. Said sum of \$19,428.92, less the sum of \$969.50 paid for taxes, was deposited in the Yellowstone Bank at Columbus, Montana, for the benefit of May Paula Mouat, Trustee, as provided for in paragraph 7 of the lease. Defendant alleges that no minimum royalties, as such, were required for the year 1943 since the earned royalties paid exceeded the minimum amount.

Defendant alleges that, as provided in paragraphs 7 and 24 of said lease, the obligation to pay a minimum royalty terminated after production was

stopped in the fall of 1943, upon direction of the War Production Board. Defendant further alleges that at all times pertinent hereto, and particularly in the year 1943, the economy of the nation was placed under the direction of the War Production Board, with authority in that Board to direct war procurement and production, including the authority to direct the acceleration or suspension of raw material production by other federal departments, establishments or agencies.

Defendant alleges that acting pursuant to its broad wartime powers, the War Production Board, in September, 1943, directed Metals Reserve Company to suspend operations on the leased premises. Defendant further alleges that said direction was a requirement, restriction and act of the Government and a contingency beyond the control of the lessee, which, under the terms of said lease, terminated the obligation to pay minimum royalties. Defendant further alleges that although production was ordered suspended, the War Production Board directed that the mine and mill be kept in standby condition pending the uncertain requirements of wartime needs.

Although the physical facilities and equipment owned and constructed by Defense Plant Corporation on the leased premises were released by the War Production Board in April, 1945, and thereafter [27] declared surplus, it was not until November, 1945, that the War Production Board authorized cancellation of the lease made by Metals

Reserve Corporation. Defendant thereafter terminated the lease, as set out in the complaint. Defendant alleges that at no time during the existence of said lease was it permitted to resume mining operations.

XI.

Defendant admits it has not executed a release or certificate of termination. Defendant denies that plaintiffs' title has been clouded thereby. Defendant alleges that by virtue of existing law, the structures and facilities on the leased premises have been declared surplus and, consequently, defendant cannot issue a release without interfering with the disposal agencies of the United States.

XII.

With respect to paragraph XII of the complaint, defendant admits the quotation from the lease. Defendant admits it has constructed a fence and kept guards at an entrance gate but alleges that said fence and gate are constructed on land owned by the United States and not on land covered by the lease. Defendant admits that in order to protect the government facilities involved a pass was required from all persons desiring to enter said gate but further alleges that plaintiff, M. W. Mouat, has at all times held a pass for entrance purposes.

Defendant alleges that in April, 1945, all Defense Plant Corporation (Plancor) structures, equipment and facilities on the leased property (but not the Metals Reserve Company lease itself) were released by the War Production Board and there-

after declared surplus, pursuant to the Act of October 3, 1944, 58 Stat. 766, 50 U.S.C., War Appendix, sec. 1611, et seq. Under Executive Order No. 9689, dated January 31, 1946, all functions and responsibilities with respect to surplus property were vested in the War Assets Administration as of March 25, 1946. By reason of existing law, said structures, equipment and facilities on the leased premises have been [28] subject to disposal as surplus property and defendant has taken no action which would interfere with their disposition in the manner required by law.

Defendant admits that on February 28, 1946, certain buildings and structures erected by Defense Plant Corporation were standing on the premises described in the lease. Defendant admits that certain plumbing equipment was removed from said buildings but alleges that removal was effected prior to six months from the time that the lease was terminated and that removal thereof was authorized by the terms of the lease.

Defendant denies each and every allegation in paragraph XII of the complaint not herein admitted.

XIII.

Defendant denies the allegations in paragraph XIII of the Complaint.

XIV.

Defendant admits that on February 28 and March 1, 1946, there remained on the premises certain personal property of the type described in the com-

plaint, which personal property was removed prior to August 28, 1946. Defendant denies that any materials so remaining were removed therefrom subsequent to August 28, 1946. Defendant denies plaintiffs are entitled to an account and denies each and every allegation in paragraph XIV of the complaint not herein specifically admitted, except the quotation from the lease.

Third Defense

Defendant alleges that all minimum royalty payments required under the terms of said lease have been paid. Defendant herein re-alleges the allegations appearing in paragraph X of the second defense.

Fourth Defense

Defendant alleges that plaintiffs at no time had acquired any right, title or possessory interest in that tract of land described in the lease as an unpatented mining claim known as "Lake Placer," with certificate dated July 16, 1940, recorded [29] in Book 23 Misc., page 400, and amended June 16, 1941, 24 Misc. 155. Defendant alleges that as to the area included in said Lake Placer claim, there has been a failure of consideration and that the terms of said lease are not applicable to any of the structures or facilities erected thereon.

Fifth Defense

Defendant alleges that plaintiffs breached said lease by failing and refusing to deliver the quit-claim deed to 200 acres of land, at lessee's written request, for use by the lessee for mill sites, town sites, stockpilings and tailings disposal.

Whereof, defendant, Reconstruction Finance Corporation, prays that the complaint be dismissed and that it be awarded its costs.

JOHN B. TANSIL,

U. S. Attorney.

MERLE C. GROENE,

Assistant U. S. Attorney,

Attorneys for Defendant Reconstruction Finance Corporation.

Service of the within admitted and a copy had, this 25th day of November, 1946.

/s/ LOWNDES MAURY,

/s/ A. G. SHONE,

/s/ THOMAS C. COLTON,

By /s/ THOMAS C. COLTON,

Attorneys for Plaintiffs.

[Endorsed]: Filed Nov. 26, 1946. [30]

In the District Court of the United States in and
for the District of Montana

No. 871

MAY PAULA MOUAT, et al.

vs.

RECONSTRUCTION FINANCE CORPORATION, et al.

ORDER GRANTING MOTION OF WAR ASSETS ADMINISTRATION TO DISMISS COMPLAINT.

Herein, it is ordered that the motion of War Assets Administration to dismiss the complaint

herein as to it, be and is granted, and the cause as to said War Assets Administration be and is dismissed.

Thereupon Court ordered that the cause as to Reconstruction Finance Corporation be and is set for trial here on November 12, 1947, at 10:00 A.M.

Entered in open Court at Billings, Montana, October 27, 1947.

H. H. WALKER,
Clerk. [32]

In the District Court of the United States, in and
for the District of Montana, Billings Division
Civil Action No. 871

MAY PAULA MOUAT, et al.,

Plaintiffs,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, et al.,

Defendants.

Before: Honorable Charles N. Pray,
United States District Judge, at Billings,
Montana, November 12, 13 and 14, 1947.

APPEARANCES

For Plaintiffs:

MR. H. L. MAURY and

MR. A. G. SHONE,

Attorneys at Law,

MR. THOMAS C. COLTON,

Attorney at Law.

For Defendants:

MR. THOMAS L. McKEVITT,

Assistant U. S. Attorney General,

MR. WILLIAM T. LENNON,

Assistant General Counsel, War Assets Administration,

MR. FRANKLIN A. LAMB,

Assistant U. S. Attorney, District of Montana. [35]

PROCEEDINGS

Be It Remembered That this cause came on regularly for hearing in the United States District Court, in the Federal Building, at Billings, Montana, on Wednesday, November 12, 1947, and concluded on November 14, 1947, before the Honorable Charles N. Pray, Judge presiding, sitting without a jury.

Whereupon the following proceedings were had and done, to wit:

The Court: Gentlemen, are you ready to proceed with the case of May Paula Mouat, et al., vs. Reconstruction Finance Corporation, et. al.?

Mr. Lamb: If the court please, at this time I would like to introduce and move the admission for the purpose of this particular case Mr. Thomas L. McKevitt of the United States Attorney General's office in Washington.

The Court: Very well.

Mr. Lamb: And may the record show he is admitted to practice for the purpose of this particular action?

The Court: Certainly.

Mr. Lamb: And I would also like to move the admission and introduce Mr. Lennon, Assistant Chief Counsel of the War Assets Administration, Washington, D. C., for the purpose of this case.

The Court: Very well, he may be admitted for the purpose of this case. [39]

Mr. Maury: This cause is at issue as to Reconstruction Finance Corporation.

Mr. McKevitt: If the court please, I think it probably would be well to dispose of the pending motion and dismiss War Assets as a defendant. I think it would clarify the situation if we took that up first, that motion that has been pending for some time in this court.

Mr. Lamb: Your Honor, I know I brought the matter up at one time. There is a minute entry. I am sorry I didn't get that minute entry.

The Court: It has already been disposed of, has it?

Mr. H. H. Walker, Clerk: Yes, your Honor.

The Court: Yes, I thought so.

Mr. Maury: May I open briefly to explain what the case is about?

The Court: Yes.

Mr. Maury made an oral statement to the court.

Mr. McKevitt: Your Honor, I would like to present our version of the case in its entirety at this point.

The Court: Very well.

Mr. McKevitt made an oral statement to the court.

The Court: Are you ready to introduce testimony? [40]

Mr. Maury: We are ready if the court says so.

Mr. McKevitt: We are ready, sir.

The Court: I think we better start in the morning.

Mr. Maury: I think so, your Honor.

The Court: We will adjourn at this time until 10:00 o'clock tomorrow morning. (5:10 P.M.)

Pursuant to adjournment, the Court convened at 10:00 o'clock A.M. on November 13, 1947, at which time all parties and counsel were present.

The Court: Proceed.

Mr. Maury: Mrs. Mouat.

Mr. McKevitt: There was one issue in the case with respect to the payment of the money for 1943, 1942 and 1943. I have the bank President under subpoena to bring their records and I wanted to make sure before letting him go. Can we stipulate right here that issue is out of the case?

Mr. Maury: Certainly. It will be testified about in two minutes.

Mr. Shone: Royalty for 1942 and 1943; the payment of royalties has been paid.

Mr. McKevitt: That is stipulated.

The Court: Very well. [41]

MRS. MAY PAULA MOUAT

was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. Mrs. Mouat, you are Mrs. May Paula Mouat?

(Testimony of Mrs. May Paula Mouat.)

A. Yes, sir.

Q. And the wife of M. W. Mouat?

A. Yes, sir.

Q. You are one of the plaintiffs as trustee in this case? A. Yes, sir.

Q. Mrs. Mouat, under the lease there was a provision for the payment of \$10,000. a year minimum royalty; that royalty was paid for 1942?

A. Yes, sir.

Q. And was it paid for 1943? A. No.

Mr. Maury: I think you are mistaken.

Q. Was it paid for 1943 by deposit in the Yellowstone Bank of the proceeds of ore?

A. There was some payment the first part of 1943.

Mr. Maury: I think you have gotten the years wrong, Mrs. Mouat.

Q. There were two years' royalty paid, minimum royalty? A. Yes, sir. [42]

Q. The first when the lease was signed?

A. Well not until the next year.

Q. What?

A. The next year. They didn't make their payment right away.

Q. You were thinking of a prior lease but I am talking about this lease of December 15th, the one here. Was the royalty, the \$10,000. paid about the time that lease was signed?

A. I don't understand.

Q. That lease was signed in 1941, the last part of the year? A. Yes.

(Testimony of Mrs. May Paula Mouat.)

Q. And there was \$10,000 paid then or about the 1st of January? A. Yes.

Q. About the 1st of January? A. Yes.

Q. And that paid the rent for 1942, did it not?

A. 1942.

Q. Then when it came to 1943 there were deposits made in the Yellowstone Bank from the proceeds of ore more than equal to the \$10,000. for 1943?

A. Yes.

Q. For 1943? A. Yes.

Q. Now since then except for a payment of \$10,000. has there been any rent or royalty at all paid on the land? A. No, sir. [43]

Q. You did get a check for \$1,000? A. Yes.

Q. In the latter part of 1945? A. Yes.

Q. And nothing else has been paid?

A. No, sir.

Q. Mrs. Mouat, how long have you lived at your present residence up on the Stillwater and close to the land in the lease?

A. For all of thirty years.

Q. And you were acquainted and familiar with the land that was in this lease in a general way?

A. Yes, sir.

Q. About a year and a month ago did you wish to visit the upper portion of the land here with some friends? A. Yes, sir.

Q. And how would that be reached from your house down on the Stillwater? How would you get there? R. Right down the main road.

(Testimony of Mrs. May Paula Mouat.)

Q. Right up the main road? A. Yes.

Mr. McKevitt: Could you get that date more exactly rather than about a year and a half?

Mr. Maury: No, I said about a year and a month ago. [44]

Q. That would be about a year and a month ago?

A. Yes.

Q. And how were you travelling?

A. We went in a car.

Q. And you entered, having a gate down there near the mill? A. Yes, sir.

Q. And how did you travel, around the boulevard that has been built up there? A. Yes.

Q. And were you anxious to visit the land up around there above what is called the town of Mouat? A. Yes, sir.

Q. And when you got to a point in the so-called town of Mouat what obstructed your way?

A. They had a chain across the road so we couldn't get up to tunnel five.

Q. You wanted to go to tunnel five?

A. Yes, sir.

Q. How was that chain fastened?

A. Well it was locked.

Q. Was there a gate on another place located on the road before you got to that point? A. No.

Q. And before you got to the land there or do you remember? [45]

A. No, I think not. I think that was the only gate.

(Testimony of Mrs. May Paula Mouat.)

Q. Only gate that was located——

A. After we passed the guard gate.

Q. What have you to say as to whether that was, through that gate was the only way that a vehicle could get to the upper portion of the land?

A. Yes, sir.

Q. That is the only way? A. Only way.

Q. Now you are named in the complaint as a trustee of certain people who signed a declaration of trust some years ago? A. Yes, sir.

Q. Has there ever been any change in that trust?

A. No.

Q. None whatever? A. No.

Mr. Maury: Cross-examine.

Cross-Examination

By Mr. McKevitt:

Q. Mrs. Mouat, you testified that you have lived in this area some thirty years. Could you point out approximately for the court where you lived? This is down about where the [46] mill is? A. Yes.

Q. Down in this general area?

A. Yes, it must be down there.

Mr. Maury: There is one little phase if you will pardon me.

Direct Examination

(Continued)

By Mr. Maury:

Q. Mrs. Mouat, on the afternoon of August 28th, 1946, that was last year, did you go to the gate down there by the mill? A. Yes.

(Testimony of Mrs. May Paula Mouat.)

Mr. McKevitt: To which we object, your Honor, for the reason any testimony pertaining to any date subsequent to August 28th, 1946, would be such time when the Reconstruction Finance Corporation, the only defendant remaining in this case, had no control or possession of this particular property.

The Court: You said on that date?

Mr. Maury: Yes.

The Court: Did you say on that date?

Mr. Maury: Yes, on August 28th, 1946.

The Court: That would not be subsequent to the date. Proceed. [47]

Q. (By Mr. Maury): Did you find there a watchman or guard?

A. Yes, they had a guard stationed there.

Q. And what if anything did you tell that watchman or guard?

A. Well I had my pass. See, we had to have a pass.

Q. You had to have a pass? A. Yes.

Q. And what did you tell him that day, do you remember? A. What, the 28th?

Q. Yes.

A. I told him that we were taking possession; their time was up.

Q. The next day or two did you see a notice posted there that referred to Bill Mouat?

A. Yes.

Mr. McKevitt: What is that date?

(Testimony of Mrs. May Paula Mouat.)

Mr. Maury: The next day or two of August 28th will be 28, 29th or 30th.

Q. (By Mr. Maury): Did you find a notice posted there that mentioned the name of Bill Mouat?

A. Yes, sir.

Q. And what did that notice say?

A. They would not let anyone—they said that he couldn't [48] go through with anything but a pickup and himself, not a man could go through, and the guards followed him when he did go through.

Q. You saw that notice there after the 28th?

A. Yes.

Q. Now you call your husband Malcolm but is he ordinarily known as Bill Mouat? A. Yes.

Q. And you knew to whom that notice referred?

A. Yes.

Mr. Maury: That is all.

Cross-Examination

(Continued)

By Mr. McKevitt:

Q. Mrs. Mouat, I believe that you pointed out before that your home is roughly in the location of the present—— A. Below the mill site.

Q. In other words, that is down off the mountain? I believe you testified you lived there about thirty years? A. Yes, sir.

Q. Now prior to the execution of this lease in 1941 did you ever have occasion to go up into the mountains to make any locations?

A. Prior to what? [49]

(Testimony of Mrs. May Paula Mouat.)

Q. Prior to 1941? Prior to the date this lease was executed?

A. Oh, yes, I went around surveying when we first came up there and we were both young and I put on riding breeches and surveyed with my husband.

Q. How did you get up in the mountains to the present location of the mine?

A. We walked.

Q. Was there a road?

A. Well there was a trail being a road but we did all of our stuff walking.

Q. In other words, is that road you used in those days still existent?

A. No, they have messed it up. They have gone just where they wanted to regardless where our road was.

Q. But the road is still there, that old road?

A. Yes.

Q. And it isn't that old road you saw this chain on?

A. What?

Q. This chain is not on the old road?

A. No.

Q. It is on the new road the Government built, is that right?

A. Yes.

Q. That is the only place where you saw this chain? [50]

A. Yes.

Q. Now you testified I believe it was practically a year and a month ago that you made this one visit to the mine?

(Testimony of Mrs. May Paula Mouat.)

A. Oh, yes, I went up there several times.

Q. Well your testimony is just as to one?

A. Yes.

Q. Now you testified I believe—let's first say the day that you made that trip how did you get on to the premises to begin with?

A. We went through guard gate No. 1.

Q. You had a pass, Mrs. Mouat? A. Yes.

Q. You have always had a pass?

A. We always had a pass to go over our own stuff.

Q. And your husband has a pass? A. Yes.

Q. And one to go over the new road the Government built? A. Yes.

Q. So you entered across this Government property at the mine?

Mr. Maury: We object. Whether it is Government property or not that is a legal question.

Mr. McKevitt: Your Honor, I think, and I think the court will take judicial notice there was judicial taking of land. [51]

Mr. Maury: I don't think the court will take judicial notice of another case.

The Court: We can't settle that point of law right now but we will note it in the record.

Q. (By Mr. McKevitt): Now you proceeded from where, Mrs. Mouat?

The Court: What do you mean to say, the property under the lease? You are talking about the leased property?

(Testimony of Mrs. May Paula Mouat.)

Mr. McKevitt: Yes, your Honor.

The Court: Part of the leased property?

Mr. McKevitt: Part of the leased property we subsequently condemned although it was in the original lease.

Mr. Maury: I doubt if any part of the leased property was condemned.

Mr. McKevitt: It is unimportant to my point here.

Mr. Maury: We have outlined and this map will be identified when the witness gets on the stand, what it is. Mr. Colton and I will explain it to Mr. McKevitt now.

Q. (By Mr. McKevitt): I simply want to ask you at what time when you left this point—when you came across the chain what time of the day was it? A. Well sometime in the afternoon.

Q. About what time in the afternoon?

A. About three or four.

Q. Pretty late; about four thirty?

A. No, it wasn't that late.

Q. Was it a week day or Sunday?

A. Week day.

Q. But rather late in the afternoon?

A. About three o'clock, shortly after lunch.

Q. Was the chain the type that was, that you couldn't actually get by physically?

A. Yes, sir, it was a very heavy chain.

Q. Now at the same time, of course, up above where this road leads to are these valuable mining

(Testimony of Mrs. May Paula Mouat.)

buildings that have been placed on this property and this chain down here would in addition to keeping you off would keep any other trespassers from coming on to your own property, wouldn't it?

A. Well, yes, but they were stopped at this first gate, those that had no business there.

Q. Couldn't they come in this other way you always came in?

A. They were stopped at the guard gate.

Q. That would be an advantage to you to have this chain here?

A. No, not that chain because that really had nothing to—well, we couldn't get through either.

Q. Meaning somebody else couldn't get through there either? A. No.

Mr. McKevitt: That is all.

Mr. Maury: That is all.

MALCOLM WILLIAM MOUAT

was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. Mr. Mouat, you may state your name.

A. Malcolm William Mouat.

Q. You are called by your friends William or Bill Mouat? A. Mostly Bill.

Q. Mostly Bill. Mr. Mouat, you are one of the parties to this lease as lessor? A. Yes, sir.

(Testimony of Malcolm William Mouat.)

Q. Mr. Mouat, have you prepared this map here?

Mr. Maury: It is for illustrative purposes only, your Honor.

Q. Did you prepare that from another map?

A. Yes, sir.

Q. Did you do the coloring on it?

A. Yes, sir. [54]

Q. And was it another map procured from some source? A. Yes, sir.

Q. Had it been used and found to be correct in general? A. I have surveyed a lot, yes.

Q. Did you help survey it? A. Yes.

Q. What does the green coloring represent on this map?

A. Unpatented ground, mining claims, placer and lode claims.

Q. What does the red, or whatever the color is represent?

A. United States patented lode claims.

Q. And can you point out—or first does it show clearly the Lake Placer as it existed on December 15, 1941? Did you hear me? If you don't hear me, you tell me. A. That is very close.

Mr. Maury: We offer this for illustrative purposes.

Mr. McKevitt: Your Honor, I feel we need a map too. Technically as to the exact location of that last question because the placer would cover

(Testimony of Malcolm William Mouat.)

a number of other locations I didn't get this to mean the entire yellow was placer.

Mr. Maury: I thought it was green.

Mr. McKevitt: In other words, the yellow is a group of placer claims? [55]

Mr. Maury: Yes.

The Court: What do you call the other color, purple?

Mr. Maury: I call it to be red but I don't know.

The Court: Well we can call it yellow and red.

Mr. Maury: Yes, yellow and red.

Mr. Maury: We offer it for illustrative purposes.

Mr. McKevitt: We have practically the same map.

The Court: Very well, then there isn't any objection?

Mr. McKevitt: No.

The Court: Very well, it may be received.

(Whereupon said Plaintiff's Exhibit No. 1, being a map, offered and received in evidence, is a part of this record.) [56]

Q. (By Mr. Maury): Mr. Mouat, I want you to explain and point out to the court—here is a pointer—I want you to explain and point out to the court here where you live, where the gate on the so-called mill property is, where the road leads up to the Lake Placer, where it leads on beyond the Lake Placer up the hill. Point it out on the Exhibit 1 there.

(Testimony of Malcolm William Mouat.)

A. Well, the first, this is where I live.

Q. Where your residence is?

A. Right in there.

Q. And where about is the gate to the property?

A. Right about there.

Mr. McKevitt: Can you translate that into the record so the record will show where he is pointing on the map.

Mr. Maury: We will mark it.

Q. Where is your residence?

A. Right there.

Q. "Residence" I am marking. And I will mark it "gate" there. A. Yes.

Q. Now where does the road go? Is it outlined on the map?

A. It is on survey around here. Around there this is on the old smelter site away around there; that was cut off and [57] comes in there. Up there another gate there.

Q. Now where was the other gate?

A. Right about there.

Q. All right, I will mark "gate" here. What ground is that gate on?

A. Lake Placer. And on north of that was another chain.

Q. Right here was another gate?

A. Yes, about.

Mr. McKevitt: Gate or chain there, Mr. Mouat? Is there a chain there or gate there?

A. Chain with lock on it. At times locked. Then

(Testimony of Malcolm William Mouat.)

the road continues around here and up here and here is the so-called tunnel 5. This road continued around here up to tunnel No. 2 right there.

Q. (By Mr. Maury): Now, Mr. Mouat, tell the court the difference in elevation between your house down on the Stillwater and the Mouat Camp on Lake Placer?

A. The elevation at our house is 5,000 feet; the elevation right here at this point——

Q. Now that is the other camp?

A. Is roughly 1900 feet higher.

Q. 1900 feet higher?

A. And from there to there is roughly 1700 feet.

Q. And what is the distance direct? [58]

A. It is a mile from there to down to this mill site.

Q. Mr. Mouat, do you recall about the first of September, 1946, seeking entrance at the lower gate with Mr. Colton, Mr. Shone and myself?

A. Yes, sir.

Q. What happened there?

A. Well I figured that I could——

Q. Not what you figured, just what happened there?

A. We were stopped by a guard. I had to phone to Columbus to Mr. Hunt.

Q. No, you didn't have to. What happened there?

Mr. McKevitt: I wish to object to any testimony

(Testimony of Malcolm William Mouat.)

as to September 1st, 1946, on the same ground Mr. Lamb mentioned before that the Reconstruction Finance Corporation is the only defendant here, and after the date mentioned this property had been turned over to the War Assets Administration.

Mr. Maury: We must take issue. We think you are a little in error. I believe on answer you said certain property had been turned over but not the lease, in your answer.

Mr. McKevitt: The lease?

Mr. Maury: But not the lease.

Mr. McKevitt: No, I didn't. You are confusing my answer. My point is anything that happened after September 1st, 1946, is not a matter for this defendant now before the [59] court; that any activities with respect to this property were acted on by the War Assets Administration not by the Reconstruction Finance Corporation.

Mr. Maury: You didn't do it in your answer?

The Court: Of course, I am not going to decide that matter now. We will take the testimony subject to your objection.

Q. (By Mr. Maury): What happened there?

A. I couldn't get my friends through that gate without considerable trouble an hour.

Q. How long did it take?

A. One hour or more.

Q. And then when you and your friends were admitted where did your party go?

(Testimony of Malcolm William Mouat.)

A. We went up through this road up to the Lake camp with the guard following us.

Q. How close was the guard?

A. Well when we stopped at one time I would say one hundred fifty feet back of us.

Q. And whenever you stopped with your party what did the guard do?

A. Seemingly stopped too.

Q. Did you go over the site of the buildings at that time with your party? A. Yes, sir. [60]

Q. And where was the guard when you were conducting your party over the site of those buildings?

A. Well there was several cars there; I couldn't say just where he was.

Mr. McKevitt: What buildings do you mean, Mr. Maury? I would like to have it clear to the court.

Mr. Maury: The buildings all over the Lake Placer there.

Mr. McKevitt: You mean all of these buildings?

Mr. Maury: Yes, we were walking around there, Mr. McKevitt.

Mr. McKevitt: You are not talking about the entire area in yellow and red on the map?

Mr. Maury: No, we couldn't get up to the other place. You don't know the country there.

Mr. McKevitt: That is what I am trying to get you down to what you are talking about.

Mr. Maury: Yes, I wish you had seen the country

(Testimony of Malcolm William Mouat.)

there and you would know you couldn't get up there at that time.

Mr. Maury: I will try to explain it to Mr. McKevitt.

Q. (By Mr. Maury): Mr. Mouat, there are certain outlines of structures on Exhibit 1. Can you tell the court if there is a plateau [61] at that point and kind of a bench, flat bench?

A. Well there is now.

Q. Was there at the time that we visited it?

A. Yes.

Q. And when you say you were walking around here, showing the houses here, you meant all of these houses? A. Yes.

Mr. McKevitt: That is what I wanted. We could perhaps save time by calling that the townsite area or some other area.

Mr. Maury: We will call it by the name you gave it, the Mouat town.

Mr. McKevitt: Who gave it?

Mr. Maury: Yes, you gave it that name. The people that got the lease gave it the name of Mouat.

Q. (By Mr. Maury): Mr. Mouat, can you tell how many structures were upon the Lake Placer at that time about the first week in September of 1946? A. Well we have another map there.

Q. You have another map which would indicate exactly? A. Absolutely.

Q. Is this the other map?

A. That is the other map.

(Testimony of Malcolm William Mouat.)

Q. And does this show the exact number of structures, [62] buildings that was upon the Lake Placer, excluding the second amendment, were upon the Lake Placer as it existed on the date of your lease?

A. That map is a copy of the company map.

Q. Is it a correct map showing number of buildings there?

A. Yes, as near as anyone can figure it out.

Mr. McKevitt: Your Honor, technically I don't think this witness is qualified but we can perhaps agree on that.

Mr. Maury: We can agree if you simply agree. We agree.

Mr. McKevitt: We have a map which I believe corresponds exactly and maybe we can get this straight now.

Mr. Maury: That is too big for our purpose. We would rather use our own.

Q. (By Mr. Maury): Mr. Mouat, is this a correct map of the number of buildings that were on the leased ground? A. Yes.

Q. And where is the dividing line here between the land that was in the lease and other land?

A. There it is as outlined.

Mr. McKevitt: Your Honor, I object to his ability actually to prove this map. [63]

Mr. McKevitt: If you take the map we have, we won't have any argument.

Q. (By Mr. Maury): Mr. Mouat, have you done surveying in that neighborhood?

(Testimony of Malcolm William Mouat.)

A. Yes, sir.

Q. And for how long?

A. Thirty years.

Q. And is that some every year?

A. Yes, sir.

Q. And do you know the boundaries of the various claims that you have located?

A. Yes, sir.

Q. And did you erect monuments there?

A. Yes, sir.

Q. Have you experience in surveying?

A. Forty years of it I could say.

Q. And are you a surveyor? I don't mean a graduate from any university.

A. I think I could do as good a job as most anybody.

Q. You have done that work? A. Yes.

Q. And repeatedly? A. Yes.

Q. And for years and years?

A. Yes, sir. [64]

The Court: Have you any further questions to ask as to the competency of the witness?

Mr. McKevitt: No, your Honor. The map is all right with me. I simply wanted his foundation of his knowing about it, but that map and our map is the same thing; so go on with the map. We have the map as illustrative and also for illustrative purposes.

Whereupon said Plaintiff's Exhibit No. 2, being

(Testimony of Malcolm William Mouat.)

map of townsite, offered and received in evidence, is a part of this record.

Q. (By Mr. Maury): Mr. Mouat, I call to your attention a black irregular line here and what does that line divide?

A. That line divides the original ground that the Government leased on the south side of this line right here is the original lease. That was an amended survey.

Q. Then the land in the original lease is bounded by a black line? A. Yes.

Mr. Maury: We will mark that black line "M," "N," "O," "P."

Q. To the left of that line as the map is now placed are the buildings that were on the Lake Placer as put in the lease?

A. What is that question.

Q. To the left as the map is placed now to the left are shown the buildings that were on the land when the lease was signed? [65]

Mr. McKevitt: That is not correct, when the lease was signed.

Mr. Maury: I did not mean that.

Q. The land as prescribed when the lease was signed?

A. Yes, the records will show.

Q. Now the number are correctly shown on that map?

A. It is tabulated right there on the map.

Q. Mr. Mouat, what kind of buildings were they?

(Testimony of Malcolm William Mouat.)

A. The houses or other buildings? You are talking of houses?

Q. Well first the residence houses?

A. About three types of houses.

Q. And of what were they constructed?

A. Cement abutments for the foundation and frame buildings.

Q. And what were the frames made of?

A. Wood, of course, and two by six's, two by four's.

Q. Of what were the floors constructed?

A. Well regular flooring.

Q. Well now is it wood or what?

A. Wood.

Q. And of what was the roof constructed?

A. Wood.

Q. Were all of the buildings there constructed of wood in the manner which you have described?

A. Yes, sir. [66]

Q. How were they we will say on March 1st, 1946, how were they arranged as to plumbing, as to wiring, and as to connection with sewer?

Mr. McKevitt: He hasn't testified yet he was up there on March 1st, 1936.

Mr. Maury: We are not talking about 1936; he was there in 1936, 1946.

Mr. McKevitt: He was just up there one day so far. I think he would have to say he was up and saw them.

Q. (By Mr. Maury): Had you been there frequently?

A. Many many times.

(Testimony of Malcolm William Mouat.)

Q. And many times during summer and winter?

A. Yes, sir.

Q. While the construction was going on?

A. Yes, sir.

Q. Were you familiar with the general condition on March 1st of that property?

A. Just roughly of those houses.

Q. You saw them from the outside?

A. Yes.

Q. How were they plumbed?

A. Well they all had plumbing, some had baths, few showers and sinks. [67]

Q. (By Mr. McKevitt): You just testified you saw them from the outside on that date?

A. What is that?

Q. When was it you saw them on the outside?

A. Oh, I have been in them with friends many times in the interior.

Mr. Maury: Mr. McKevitt, we don't annoy people that way out in this country.

Q. (By Mr. Maury): Were they lighted?

A. Electric lighted, yes, sir.

Q. Were there sewer connections?

A. Yes, sir.

Q. And you may describe, in your own language you may describe what conditions those buildings were in on March 1st, 1946?

A. Well, of course, all buildings suffer in that kind of weather from deterioration, weather and so forth but the buildings were in good shape.

(Testimony of Malcolm William Mouat.)

Mr. McKevitt: I still say if the witness is going to be asked questions of a particular date, March 1st, 1946, he should show he was there on March 1st, 1946.

The Court: Well you can develop that on cross-examination. [68]

Witness: May I look up my diary to suit you?

Mr. Maury: We don't want to unduly delay matters, Mr. Mouat. We want to speed the case.

Q. (By Mr. Maury): Mr. Mouat, did you notice any change taking place in those buildings about the last week in August of 1946?

A. Yes, sir.

Q. What was happening to them?

A. Being torn down many of them, most of them.

Q. And what happened to the plumbing?

A. Well it seemingly was taken out as it was not there.

Q. And what had happened to the electric wiring?

A. Lots of that was destroyed, taken out, cut off and stored somewhere. I don't know where.

Q. What had happened to the sewer connections?

A. They had to be disconnected in order to move a house off.

Q. How many of the houses by August 28th had been demolished?

A. I think about that row was in the process of being demolished.

(Testimony of Malcolm William Mouat.)

Q. Now show which row was in the process of being demolished? A. On this row.

Q. Now by that row—— [69]

A. And some there.

Mr. Maury: I am marking the row.

Mr. Shone: Mr. Maury, the map is already marked with “C” for those demolished. Explain what the markings of the houses are.

Q. (By Mr. Maury): I will ask you if you mean the houses in the row to the right hand side of First Street west? You see the words “First Street west”?

A. Yes.

Q. And by that row you mean?

A. The C’s to the west.

Q. No, that is to the east, but it is to the right hand side of First Street west?

A. Yes, that is marked there on that schedule.

Q. About March the 11th, 1946, did you complain by telegram or letter to the Reconstruction Finance Corporation about the proposed demolition of those houses? A. Yes, sir.

Q. And to whom did you make complaint?

A. I think the telegram went to Allan Brown the attorney for—whether it is Reconstruction Finance Corporation or Metals Reserve or what not, it is marked on my telegram.

Mr. Maury: We will find that in the course of the day. I will proceed to another question. We can find that telegram. [70]

Q. Mr. Mouat, did you go to your property or

(Testimony of Malcolm William Mouat.)

to the properties of Lake Placer a week or two ago with two young architects? A. Yes, sir.

Q. What were their names?

A. Harry Loners and Elmer Link.

Q. Was there any stenographer or any writing done?

A. Yes, sir, two stenographers.

Q. Of matters that were observed there?

A. Yes, sir, two stenographers.

Q. And you took them to the property?

A. Yes, sir.

Q. What did you do as to showing them the property that was in the lease and the property that was not in the lease?

A. We went through every house and building.

Q. Every house and building? A. Yes.

Q. Of property that was in the lease?

A. In the town site and the town of Mouat.

Q. Within the town site? A. Yes, sir.

Q. But did you show them a plat with the line of demarcation? A. Yes, sir.

Q. Did these young men, or rather one, observe the [71] conditions in one half of the buildings and the other observe the conditions in the other half of the buildings?

A. Yes, and jointly all together.

Q. And each one was using a stenographer all the way? A. Yes.

Q. In writing down what was found?

A. And as I stated jointly they all went into

(Testimony of Malcolm William Mouat.)

certain buildings so they could consult each other.

Q. Yes. Mr. Mouat, was there a wooden tramway from that property down to the mill?

A. Did you say wooden?

Q. With wooden uprights or what were the uprights? A. Iron uprights, steel.

Mr. Maury: I beg your pardon, the question and answer may be stricken.

Q. Mr. Mouat, how much rent has been paid? How much rent has been paid under the lease?

A. Do you mean royalty?

Q. I mean rent. I mean the \$10,000. a year.

A. Well that would be in the bank record which we have.

Q. But how many years have you received the rent?

A. I would say that first ten thousand in 1941.

Q. And how was the second ten thousand met?

A. Met by some royalty I presume.

Q. It was met was it? [72]

A. Yes, and the third, well, just a minute. That would be two years?

Q. Two years it has been paid? A. Yes.

Q. And that would be for 1942 and 1943?

A. Yes, the last quarter of 1943.

Q. And there was \$1,000 received after that?

A. Yes, just when they gave up the lease to comply with the lease they gave that up.

Q. Is that all?

A. I will not state that but I will state that—

(Testimony of Malcolm William Mouat.)

Q. I mean all that has been paid on the rental?

A. You said all and I want to be correct.

Q. Yes.

A. It was two or three or four hundred dollars, whatever it is, in that it was paid to the bank and that was a part of an overpaid tax from either Nelson's office or Gaethke; Gaethke was manager and Nelson worked under him. I would have to look that point up.

Q. But as far as the rent is concerned there has been two years' rent and \$1,000 paid?

A. Yes.

Q. That is all?

A. Some other royalty you know.

Q. I realize that but the royalties if there was over-payment [73] in one year, it could not go forward to another year, could it?

A. Well that part of the lease is too deep for me to understand.

Q. That is the lease, yes. Mr. Mouat, since March 1st, 1946 have some of these houses been occupied? I mean those on——

A. Lake Placer?

Q. Yes, sir. A. Yes, sir.

Q. Do you know about how many of them?

A. I never counted them.

Q. Are some of the same people—did some of the same people that were occupying them before March 1st continue to occupy them afterwards?

A. Yes, sir.

(Testimony of Malcolm William Mouat.)

Q. Can you name some of them?

A. Well I would say that Art Helseth was one man. The others lots of them know me and I have known some of the young fellows there for years but I do not know their names unless I thought deeply.

Q. And they were occupying them before the notice of termination was received and they continued to occupy them afterwards?

A. Yes, sir. [74]

Q. Are some of them occupying them now?

A. Well one of them was locked the other day but that is just off that line.

Q. How late have people been occupying them?

A. Well there is a great many men up there now tearing down houses and where they are camping or living I did not go around like a policeman to see.

Q. By the way are they transporting houses from that property right now or when you left to come to court?

A. The other day.

Q. From what property are those houses coming down the hill?

Mr. McKevitt: I have an objection, your Honor. It is very important whether they are inside or outside of that line and general talking about the houses does not give a true picture.

The Court: You will have to be certain about it so the record will speak the facts.

Mr. Maury: Yes.

(Testimony of Malcolm William Mouat.)

Q. (By Mr. Maury): Is anything being done about the houses to the left of the line "M" "O" "P" now or recently?

A. The top of the map is always north.

Q. Yes, the top is north.

Mr. McKevitt: As I understand it any testimony [75] with respect to any activities after September 1st, 1946 is subject to my objection?

The Court: Yes.

Q. (By Mr. Maury): What happened right there in the last two or three weeks?

A. North of that line a great many buildings on the——

Q. North of the line?

A. This is north.

Q. We don't want—we are not concerned with those. What is happening to the buildings south of the line there and west of the lines "M" "N" "O" "P"?

A. I do not know that anything is happening there.

Q. They are not so far as you know. Have any of those buildings that are on the ground in the lease been removed?

A. What is that question again?

Q. Are any of those buildings that are on the ground in the lease been removed?

A. When do you mean?

Q. I mean since the 1st of March, 1946, and up to the present day how many of the buildings

(Testimony of Malcolm William Mouat.)

on the land in the lease have been removed?

Mr. McKevitt: Objected to, your Honor. The form of that question is too broad. I would like to have him state the date when they were removed.

Mr. Maury: You know the dates. We have asked for the dates in our complaint, the dates of everything and you haven't answered them.

Mr. McKevitt: It is important as to what you are asking this man to testify to. Is he testifying to one time or another?

The Court: As of what date did he notice the removal of buildings or anything up to what date.

Mr. Maury: We ask of counsel if you have the dates of removal we demand them.

Mr. McKevitt: The buildings were removed after September 1. The ones that were removed from the premises were removed by the War Assets Administration. There were some twenty odd after that date; that is the reason I am making these points.

Mr. Maury: Have you the dates?

Mr. McKevitt: I have got them, yes.

Mr. Lamb: You have a right to secure them in a bill of particulars.

Mr. Maury: We demanded them in the complaint and if they are in court and available, we demand them.

The Court: I am just wondering where we are going to drift to in this connection. If we are going to drift to an accounting which must be had, it would take a very long time. [77]

(Testimony of Malcolm William Mouat.)

Mr. Maury: No, sir, we expect to get our testimony in today.

The Court: Houses, buildings, nuts, and nails, timbers and everything of that sort, have you got an inventory of all that stuff?

Mr. Maury: We have asked them for it. We demanded these back two or three weeks ago.

Mr. McKevitt: Your Honor, we are perfectly willing to concede 22 buildings were removed after September 1, 1946.

Mr. Maury: That is all we wish.

The Court: Do you want to show how many were removed before that?

Q. (By Mr. Maury): Do you know how many were removed before September 1st, 1946? I think there was only one or two.

A. That I would have to look into my diary, but when you filed the *lis pendens* right after that this destruction seemingly stopped right after that date.

Mr. McKevitt: That is not responsive. I move to strike that. Just answer the question.

The Court: He wouldn't know without referring to his diary.

Q. (By Mr. Maury): Mr. Mouat, have you the pass with you that was [78] required of you to get to your own land? A. Yes, sir.

Mr. Maury: Let's see it.

Q. Did anyone demand that pass of you after it was delivered to you? A. Yes, sir.

(Testimony of Malcolm William Mouat.)

Q. Who did?

A. One of the guards at the gate.

Q. About when was it that it was demanded that you deliver it up?

A. Shortly after the date that you were up there that I couldn't get through.

Mr. McKevitt: That doesn't mean anything in the record.

Witness: This is roughly the time of August 28th.

Mr. McKevitt: Roughly August 28th, 1946?

A. (Witness): Well within the course of a few days when we was having all this trouble.

Mr. McKevitt: 1947 or 1946?

A. (Witness): August 28, 1946, is when this thing was to terminate.

Q. (By Mr. Maury): And about how many days after that did they demand this pass of you?

A. Oh, I would say two or three days. I was at Helena [79] at the time my wife took possession.

Q. When she took possession or tried to take possession?

A. We thought we took possession.

Q. About how many days after you, after that August 28th was this pass demanded of you at the gate and that you surrendered it?

A. I would state that that was the following Monday after August 28th, just two or three days, because I come from Helena and had a registered letter, two or three of them from War Assets which

(Testimony of Malcolm William Mouat.)

I have in my file, and then they asked me to turn that pass in and I wouldn't.

Mr. Lamb: Your Honor, I ask then that all of this testimony with reference to this pass be stricken from the record because this witness testified demand was made by War Assets and if such demand was made by the War Assets, the Reconstruction Finance Corporation is the only defendant remaining in this case and is not responsible for its actions.

Mr. Maury: The answer is that the lessee is the one the landlord looks to in law and we are looking to that lessee right now.

The Court: Well that is the same objection made here before. It will be received. The testimony will stand subject to that objection.

Mr. Maury: We offer in evidence the pass that was spoken of. [80]

The Court: All right, mark it.

Mr. McKevitt: The same objection.

The Court: All right.

(Whereupon said Plaintiff's Exhibit No. 3, being an Identification Card Serial No. 450, offered and received in evidence, is a part of this record, and is in words and figures as follows, to-wit:)

(Testimony of Malcolm William Mouat.)

PLAINTIFF'S EXHIBIT No. 3

Columbus, Montana

Identification Card

Ser. No. 450

Name—William Mouat.

Address—Nye, Montana.

(Defense Plant Corporation)

Signature.....

Issued by—Harry C. W. Richter.

Date Issued—Jun. 1944.

Issued Permanently.

(Reverse Side)

Card No.....

Occupation.....

Age..... Weight Height.....

Hair..... Eyes.....

Car No.....

Upon termination of employment this card must be returned to timekeeper. [81]

Q. (By Mr. Maury): Mr. Mouat, what have you to say as to whether the guards have been at the lower gate steadily since March 1st, 1946?

A. There was three shifts there for a while and then it dwindled to two and finally to one.

The Court: Answer the question.

Q. Answer the question. What have you to say whether those guards have been at the gate steadily since March 1st, 1946?

A. Up to the present time?

Q. Yes.

A. There's no guards there now.

(Testimony of Malcolm William Mouat.)

The Court: Answer the question.

Mr. Maury: Answer the question, Mr. Mouat.

Q. What have you to say whether those guards have been there steadily since March 1st, 1946?

A. The last month they haven't been there.

The Court: Yes or no.

Q. Were they steadily until about a month ago?

A. I would say yes.

Q. Continuously were they there?

A. Yes.

Q. And was there any man in charge up at the Mouat camp?

A. I think Mr. Hugh Nicely was the man in charge of it. [82]

Q. Is he here in the court room?

A. Yes, that is Hugh.

Mr. Maury: The lease is an exhibit to the complaint; it is admitted to be correct in the answer.

The Court: We will take a recess. (11:20 A.M.)

(The court then recessed until 11:30 A.M., at which time the parties and counsel were present.)

The Court: Proceed.

Mr. Maury: If the court please, we have two young men here, professional men, and one of them wants to get away to Glendive on his business and we would ask leave to put Mr. Link on at this time.

The Court: Very well. No objection.

Mr. McKevitt: No objection.

ELMER LINK

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Shone:

Q. State your name to the court.

A. Elmer Link.

Q. What is your business, Mr. Link? [83]

A. Office Manager, J. G. Link & Co.

Q. And what business is J. G. Link & Co. in?

A. Architectural Engineers.

Q. What college are you a graduate of?

A. University of Oregon, bachelor of science degree.

Q. Masters? A. Bachelor of Science.

Q. Bachelor of science degree? A. Yes.

Q. And did you study architecture in college?

A. Yes.

Q. And in the business that you are now in what do you do, what does it consist of?

A. Preparation of plans and specifications, design of buildings, estimated quantities and estimating costs.

Q. How long have you been in that business? That is, you yourself?

A. Off and on about eighteen years. Ten years I would say probably would be the full time.

Q. And in the last ten years has your business consisted solely of giving estimates of construction and figuring out price of materials and labor and things of that sort?

(Testimony of Elmer Link.)

A. No, it is design and preparation of plans and specifications which always involves estimate of the building to the owner. In other words, we have to give the estimate of [84] cost to the owner on preliminary sketch, preliminary drawing or preliminary study we call it. It is our business to determine for the owner about how much money these buildings are going to cost, frame, reinforced concrete, steel, or whatever it is.

Q. And how about buildings already built do you give estimates to people who want to buy?

A. Occasionally.

Q. How often?

A. We have occasion probably once every four months.

Q. To estimate value of buildings already constructed? A. Those are larger buildings.

Q. Now have you had occasion to go up to what is known as Mouat town or Mouat camp in the Stillwater country? A. Yes.

Q. And showing you plaintiff's Exhibit No. 2, which is a map, have you seen that map before?

A. Several times. We spent—about two weeks ago we made a trip up there as preliminary examination. Saturday, November 8th we made a trip specifically to examine all of the buildings on this plot of ground known as the upper Mouat upper Lake camp and we did examine only those buildings according to that plat as we called them for identification purposes.

(Testimony of Elmer Link.)

Q. Now I notice on this plat that the houses you numbered, all the buildings numbered are south of the line which is now marked "M" "N" "O" "P", is that correct? A. That is correct.

Q. You did not mark any of the buildings north of that line "M" "N" or east of the line "N" "O" or north of the line "O" "P"?

A. We examined buildings as we identified it. As I recall building No. 8-E was occupied. Exclusive of that it was just those buildings south of the "M" "N" line there were the buildings that we examined.

Q. Those that are numbered from 1 up to 78?

A. 78, that is right.

Q. And also from 1 up to 20?

A. That is correct.

Q. And including how many barracks?

A. 4 barracks we examined and including the mess hall or boarding house, and the store, and hospital, and then there was a post office there.

Q. Well now in reference to the one you mention No. 8-E that was north of the line "O" "P" and is now excluded? A. Yes, it is excluded.

Q. You did however examine it but it was not within the leased property? A. That is right.

Q. Now do you understand that the property, that the [86] buildings which you marked and have figures on here and the numbers was property within the leased property? A. That is correct.

Q. Or within the lease? A. That is right.

(Testimony of Elmer Link.)

Q. Now who did you go up with?

A. Mr. Loners.

Q. And who is Mr. Loners?

A. Mr. Loners is associated with our firm, J. G. Link & Co.

Q. And he is a licensed architect?

A. Yes, he is a licensed architect.

Q. The two of you went in all of the houses there on what now is known as the leased property?

A. We did not go into all of the houses. We entered all of the houses we could enter, but every house we looked into every house. We couldn't enter all of the houses but some of them we could see that the plumbing fixtures were gone. We did not enumerate anything in our letter of explanation to Mr. Mouat other than what we could actually see.

Q. So you did give him a letter of what fixtures were removed in each of those houses?

A. Yes.

Q. And what damage was done to each of the houses? A. Yes. [87]

Q. And anything mentioned in this letter which I have from you to Mr. Mouat that damage which you have listed here or destruction, you actually saw that? A. That is correct.

Q. If they were destroyed in any other respect than what is stated in your letter, then you did not see it and it is not listed? In other words, I mean there may be some destruction you did not see?

A. That is correct. We did not. When we made

(Testimony of Elmer Link.)

the letter up we made it up with the idea that we were going to be—we did it as conservatively you might say as possible, and there were a good many small items there that we overlooked. But for the purpose of estimating which we possibly, we didn't breakdown every little item. We took only those items which were quite visible or very visible to anybody and we gave that. We included those items but not, well, here and there there was a wall-board gone or cut or broken; we didn't take those small items into consideration.

Q. The houses that you have marked there on the plat, what kind of houses are they?

A. All frame houses. Most of them single family dwelling house, some duplex.

Q. But all frame houses are wooden buildings?

A. Yes.

Q. Everything on the leased property? [88]

Q. What do they set on?

A. Concrete piers.

Q. And are they attached to the concrete piers in any way?

A. The stringers rest on the concrete piers.

Q. And the concrete was imbedded in the ground?

A. That is right. In some cases the piers were upset and the houses missing.

Q. Now you have listed over here the character of buildings that were on the leased property as you found them? A. Correct.

(Testimony of Elmer Link.)

Q. And according to this map there were 22 duplex houses? A. 20 duplex houses.

Q. Those 20 are numbered, are they not, from 1 to 20 on the map?

A. We numbered those for the purpose of identification, yes.

Q. The other numbers here, larger numbers like 296, 295, 294, I will ask you if those were the numbers that were on the houses, a house number?

A. Yes, house number.

Q. But the numbers you put on are figures 1, 2, 3, 4, 5, up to 20? A. Yes.

Q. Denominating there were 20 duplex houses?

A. That is right. [89]

Q. And then there were four barracks and you have over here in red a "B" which stands for barracks? A. That is right.

Q. And there were four barracks within this area? A. That is correct.

Q. And then you have 22 single units removed, and then over here in red you have "C" which denominates those particular units?

A. The "C" unit we were unable to definitely determine due to snow and everything just what size those "C" units were. Now we assumed that there were two different types of single family dwelling houses there, one as I recall 24 by 25 and I think the other 26 or 27 by 28 roughly. Now we assumed that the smaller, the "C" unit was the small single family units.

(Testimony of Elmer Link.)

Q. But those that are marked "C" I notice are the ones that have been removed?

A. They have been removed.

Q. And there are no other buildings marked "C" except those that have been totally removed?

A. Correct, that is right.

Q. And there are 51 single units which you marked here. Now the 51 that you marked "E", they still remain there?

A. That is right.

Q. Now, of course, as you say, the plumbing fixtures and wiring has all been removed out of those? [90]

A. The plumbing fixtures have all been removed, and the wiring fixtures as we have enumerated and the like have been removed. Now there is some of the houses the wiring is removed completely and some of the houses the wiring is intact, but where the outlets occurred they cut the wires so short that they have ruined the whole wiring system and it would be up to—and then some of them the porcelain fixtures were there in part and some of the porcelain fixtures were there entirely. We tried to enumerate those various items there that were missing in the different houses.

Q. In order to expedite this matter for the court, Mr. Link has prepared a letter here and has denominated each house which he examined on the leased premises, stating here what has been removed or what has been destroyed in each house, and giving his estimate of the replacement cost so as to put the

(Testimony of Elmer Link.)

house back in the same condition as it was before destruction, isn't that true?

A. That is correct.

Q. And in your statement that you have prepared you have identified each house and those things which have been destroyed or taken out?

A. Correct.

Q. And then as to all of those items which have been removed from the houses what the cost of repairing what has been destroyed in the house you have estimated it giving a [91] total estimate for each house?

A. A replacement cost to put that building back in shape in its original form.

Q. And that has gone for each house?

A. Yes.

Q. And is the statement which I hand you which is the letter from you to Mr. Mouat, is that a true and correct statement of the replacement cost of all of the items which were removed or destroyed?

A. No.

Q. That you show?

A. No. It is based on current prices. Our figures were very conservative. It is doubtful—approximately 75 to 80%. In other words where we have \$1,000 it would be very doubtful and I would say this that you couldn't get a contractor to go up there for the figures that we have indicated here to replace the damage that has been done to those houses,

(Testimony of Elmer Link.)

and these figures are possibly 75 to 80% of the actual cost that it would take to repair these buildings.

Q. In other words, it is 75 to 80% less?

A. That is right.

Q. Than what a contractor would actually charge or 20 to 25%?

A. Yes. In other words, these figures actually represent 75 to 80% of the value of what it really would actually cost. [92] In other words we wanted to be conservative on these figures and we do know that these figures are minimum figures in so far that it would cost at least the amount that we have indicated here. That is the way we have tried to get this letter up to do it correctly.

Q. And in basing your valuation on replacement cost on each of the items stated in each of the houses you have taken a minimum figure?

A. That is correct, yes.

Q. And something less than what a contractor today would do it for?

A. That is right.

Mr. Shone: Now in order to save time I will offer this in evidence and the court then could check each house as to the replacement cost of putting it back in the same condition it was.

The Court: Have counsel on the other side seen the letter?

Mr. McKevitt: No, your honor.

The Court: Well you better give them an opportunity to look it over during the recess. Have you an objection to it?

(Testimony of Elmer Link.)

Mr. McKevitt: Yes, we will have an objection.

Mr. Lamb: We haven't seen it.

The Court: Let them look at it. [93]

Mr. Shone: I gave them a copy.

The Court: All right.

Mr. Shone: Well there would be no necessity for me to go into each item.

The Court: I think he covered the ground pretty thoroughly.

Q. (By Mr. Shone): Each and every item stated in this letter is correct and was made by you?

A. By myself and Mr. Loners.

Q. Yes, but each item is correct?

A. It is minimum cost.

Q. And is it correct?

A. It is minimum cost of replacement.

Q. And that covers each and every house on the leased premises?

A. It covers each house, each building.

Q. Each building?

A. Each building. There is one item of the mess hall which we did not include and which we could not determine. We have said that I think we estimated there just the wallboard and wainscoting, and a few plumbing fixtures we could not determine which were in a 4 x 5 room, and apparently there were a good many kitchen fixtures that we couldn't determine what size units they were or just what was missing in there. [94]

Q. May I ask you on something besides the cost

(Testimony of Elmer Link.)

of replacing these various houses and the condition in which they were. We will say for salvage if one was to sell each of these buildings to a purchaser who would be willing to pay for the buildings, to pay the owner for the buildings and remove them at the purchaser's own expense from the property, what would you think would be the reasonable purchase price to the owner of those buildings for the salvage?

A. The buildings in their present condition. The plumbing fixtures have all been removed and wiring fixtures, salvage value would not, it would not represent any, it would not represent a very great portion of the actual cost of constructing them up there, probably seven to eight hundred dollars, I would say.

Q. For each building?

A. Yes, in their present condition.

Q. And if the plumbing were in each of the buildings as originally constructed, what would the salvage value of each of the buildings be?

Mr. McKevitt: If the court please, we object to that on the ground the testimony of this witness is that he isn't familiar with the houses in their original condition.

The Court: I don't know whether he is qualified to testify to the value of the plumbing. I think Mr. Maury brought that—What was the value of the plumbing took out if you know? [95]

A. Put it this way, that the ordinary house, five

(Testimony of Elmer Link.)

room house will cost about \$900 to \$1000. on the average for the plumbing fixtures which that house had in it. That would include tub, water closet and lavatory and sink in the kitchen. That could be very difficult to determine unless you actually had a contract bid on it whether that plumbing was in there or out of there. Now if the contractor moved that house he has the opportunity of taking the plumbing out and selling the items piece by piece, or the opposite, leave them in there. Now I would say moving it in bulk I would roughly say it would increase the value of that house by not less than \$300.

Q. The plumbing?

A. Yes, if everything was intact.

Q. That is on salvage?

A. Conservative figures, yes.

Q. And you gave us the value of the houses without plumbing at around \$800.?

A. I would say you could probably get bids on those houses between seven and eight hundred dollars.

Q. Between seven and eight hundred dollars?

A. Yes.

Q. And the plumbing for salvage would be around \$300? A. Yes.

Q. Now the 22 houses that were destroyed, of course, [96] there is nothing but the foundation, concrete foundation left?

A. In most cases. In some cases the piers were missing or upset.

(Testimony of Elmer Link.)

Q. Now the piers you mean the foundation?

A. Yes.

Q. Are broken or upset? A. That is right.

Q. Part of the houses themselves are all gone, the wooden structure and the plumbing?

A. Correct.

Q. All the houses that are there at present, not ones that have been removed, you examined them carefully? A. Yes.

Q. As to what they were made out of?

A. That is right.

Q. And the floors inside, what were they made of?

A. It consists of subfloor and 1 by 4 fir flooring.

Q. Fir? A. Yes.

Q. Then there are wooden floors in each of the houses? A. That is correct.

Q. The structures themselves were made out of wood? A. That is correct.

Q. And what about the roof of each of the buildings? A. Fir roof. [97]

Q. That is wooden roof? A. Yes.

Q. All of the buildings are made of wood, is that true?

A. That is correct. Frame construction as it is generally called.

Mr. Shone: That is all. That is with the exception that after they look at this I would like to ask leave of court to put this in for the assistance of the court in arriving at what the witness has testified to.

(Testimony of Elmer Link.)

The Court: You may begin cross-examination.

Mr. McKevitt: I would like to defer it until we have an opportunity to read this.

Mr. Shone: I probably could call the other witness. It would just take five minutes. Mr. Loners.

Mr. Maury: I think we have shown that.

Mr. Shone: That is all I want him to say, that he was there and assisted.

The Court: He is right here; put him on the stand.

HARRY LONERS

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Shone:

Q. Your name? A. Harry Loners. [98]

Q. You are a graduate of what college?

A. University of Washington.

Q. With what degree?

A. I have a degree in architecture, bachelor of architecture.

Q. For whom do you now work?

A. I am associated with J. G. Link & Co., Architects and Engineers, Billings.

Q. How long have you been working for that company? A. Since 1935.

Q. And in your business what do you do?

A. I perform all the duties of an architect.

(Testimony of Harry Loners.)

Q. And that is making estimates of buildings, the cost? A. That is one of the duties.

Q. In estimating the cost of buildings do you also estimate the cost of plumbing, wiring and things of that sort?

A. It is all considered part of the cost of building and you have to make estimates of that portion of the work as well as all other portions.

Q. And you keep up on the price of plumbing materials, cost price? A. Yes.

Q. And wiring and also lumber? A. Yes.

Q. Wire and steel? [99] A. We have to.

Q. Now did you go up to the Mouat camp with Mr. Link?

A. I was up there with him last Saturday, November 8th.

Q. Did you go on the portion of the property at the upper camp known as Mouat camp shown on Plaintiff's Exhibit 2? A. Yes.

Q. You are familiar with this map?

A. Yes.

Q. And the houses that are on what is known as the leased premises are all numbered?

A. Yes.

Q. And you went in those houses with Mr. Link or some of them?

A. Well as he stated we went into those houses that were open and we looked through the windows of those that were locked.

Q. And you made, you prepared with Mr. Link

(Testimony of Harry Loners.)

a letter to Mr. Mouat of the damage done in each of those houses? A. Yes.

Q. And is that the letter?

A. That is the letter.

Q. You are familiar with the replacement costs mentioned in that letter? A. Yes, sir.

Q. And you have figured them out with Mr. Link? [100] A. Yes, sir.

Q. And that covers the items of damage to each of the houses of the premises and the plumbing missing? A. The houses on those premises.

Q. And also with the plumbing taken out?

A. Yes.

Q. And that is all identified in that letter?

A. Yes.

Q. Is the itemization of what is missing or the repairs that are to be made to each of the buildings correct? A. Yes.

Q. And is the figure for the replacement cost is that correct?

A. Well that is an understatement if anything.

Q. It is an understatement?

A. It is what would be considered very minimum value to make those repairs and replacements as of the present day.

Q. Would the contractor today contract to make those replacements at your figure?

A. I doubt it very much.

Q. But other than that figuring the minimum price the statement is correct? A. Yes.

(Testimony of Harry Loners.)

Mr. Shone: That is all. [101]

The Court: Now after counsel on the other side has had a chance to examine this statement he will probably want to cross-examine these witnesses.

Mr. McKevitt: Yes.

The Court: I understand they will both be here?

Mr. Maury: Mr. Link wants to start for Glendive on an engagement about three o'clock.

The Court: Well he can come back at two o'clock. Court will stand in recess until 2:00 o'clock.

(12:00 noon.)

The Court then resumed at 2:00 o'clock P.M. on November 13, 1947, at which time the parties and counsel were present.

The Court: You may proceed.

ELMER LINK

· resumed the stand and testified as follows:

Cross-Examination

By Mr. Lennon:

Q. Mr. Link, you testified——

Mr. Shone: Just a moment. We offer this in evidence.

Mr. Lennon: We have no objection to allowing this to go in evidence to indicate what Mr. Link did testify to. [102]

Mr. Shone: Now let the record show that Plaintiff's Exhibit No. 4 is the letter from J. G. Link

(Testimony of Elmer Link.)

and Co., Architects, to M. W. Mouat, which the witness now on the stand has been testifying about.

The Court: Very well, it may be received for what it purports to be.

(Whereupon, said Plaintiff's Exhibit No. 4, offered and received in evidence, is in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT NO. 4

Offices: 317 Electric Building
Billings, Montana—Tel. 5453

Butte Office
111 North Montana
Tel 23604

Member of:

A.I.A. and M.S.E.

J. G. Link & Co.
Architects—Engineers

Billings, Montana
November 10, 1947

Mr. M. W. Mouat
Nye, Montana
Dear Mr. Mouat:

As per your request on Saturday, November 8th, 1947, we examined the buildings located on the property known as Mouat Lake Camp.

For the purpose of identifying the buildings we used a print from the tracing labeled "Plat of Lake Camp for Fire [103] Department." This print in-

Plaintiff's Exhibit No. 4—(Continued)

cluded a legend which was printed on the plat after it had been developed from the tracings. The legend enumerates types of buildings classified as types A, B, C, D, E, F, G, H, I, J, and L. In order to more particularly identify these buildings, we have numbered all of the structures lying southwest of Mouat Avenue, commencing in the South West corner of this plat with #1 and ending in the N. E. corner of this area with #98.

The buildings lying N. E. of Mouat Avenue have been numbered 1A to 20A for the type A duplex residences and Barracks #1 to 4 inclusive labeled on plat type "B" buildings. The remaining 2 structures in this area are labeled F and L and as they are not similar to other structures we did not number them.

The single family dwelling units, labeled 1 E to 12 E inclusive and 13 C to 34 C inclusive, measured 24'-3" x 25'-3" outside dimensions. These units all contained living room, kitchen, two bedrooms, closets and bathroom which did contain a shower stall unit, water closet, medicine cabinet and lavatory. The single family dwelling units labeled 36E to 98E inclusive, measured 26'-11" x 27'-10" outside dimensions. These units contained living room, kitchen, 2 bedrooms, closets and bathroom originally with tubs instead of showers. One of these units had a built [104] in stair to utilize the attic space for sleeping and storage room this building is labeled 36A.

Plaintiff's Exhibit No. 4—(Continued)

The following is a list of the buildings which have either been removed entirely from the site and or which were damaged by the removal of portions of the buildings:

House No. 1E

Missing—Kitchen sink, fittings and pipe.

Lavatory, water closet, shower stall & fittings.

All light fixtures, switches, convenience outlets.

One closet door, frame & trim.

Two sides of baseboards in one bedroom.

One side of baseboard in living room.

Heater.

Outside baseboard all around.

Oil storage tank & piping.

Corner boards.

Estimated replacement cost.....\$1020.00

SCHEDULE OF CHARGES:

For full service including supervision, 7% of cost; For partial services as follows: For preliminary sketches 1%; for drawings and specifications, including sketches and details, 5% of estimated cost. If work is executed on cost plus contracts add 1%.

To: M. W. Mouat

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Plaintiff's Exhibit No. 4—(Continued)
House No. 2E

Missing—

Entire kitchen cabinet, sink, fittings 7 pipe.

Lavatory, water closet, shower stall & fittings.

All electric fixtures, switches and convenience outlets.

All interior doors, frame & trim.

All window casings.

All Baseboards.

Electric wires cut close so as to not be reusable.

Some wallboard knocked off, some damaged.

Outside baseboards & corner boards & oil storage tank.

Heater.

Estimated replacement cost.....\$1000.00

House No. 3

Same as 2E plus the electric feeder panel.

Outside same as 2E,

\$1000.00

No. 4E

Same as 2E plus about 30% of wall board removed from inside walls and partitions.

Outside same as 2E.....\$1050.00

No. 5E

Same as 2E.

All wallboard removed from interior.

Plaintiff's Exhibit No. 4—(Continued)

All electric outlet boxes gone.

All Water pipe removed.

Flue pipe missing.

Outside same as 2E.....\$1150.00

No. 6E

Same as 5E except flue pipe laying on floor.

Outside same as 2E except $\frac{1}{3}$ porch floor
boards removed.....\$1140.00

No. 7E

All plumbing fixtures, fittings and water
pipe removed.

All light fixtures, switches & convenience
outlets removed.

All interior doors, frames & trim except 2
doors complete.

All ceiling board in bath, livingroom & 1
bedroom removed.

All wall board in bath, 1 bedroom & 2
closets removed.

All wallboard in outside walls of living
room, $\frac{1}{2}$ wallboard on inside walls of
living room.

Insulation from one wall of one bedroom.

6 outlet boxes.

All baseboard in bathroom living room & 1
bedroom.

Outside oil storage tank.....\$1450.00

Plaintiff's Exhibit No. 4—(Continued)

No. 8E

Oil storage tank from outside.

Evidently occupied & complete inside.....\$20.00

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House No. 9E

Missing

Plumbing and Kitchen fixtures including
all galvanized pipe, (4" soil pipe is in
place). [107]

Wallboard between Kitchen and bedroom
and kitchen and bathroom is missing.

Partition completely removed between bed-
room and living room.

All Electrical fixtures.

Copings around doors and windows.

Heater and Storage tank.

Estimated replacement cost.....\$1350.00

Note: There is at least 2,000 bd. feet of
casings and base board in storage here.

No. 10E

Same as 9E, except all wall board missing.

Insulation batt type damaged.

Fir flooring removed in bedrooms.

\$1400.00

Note: Fir flooring that has been removed
stored here.

Plaintiff's Exhibit No. 4—(Continued)

No. 11E

Same as 10E, except all flooring removed.

All wiring removed.

1 window lite broken.....\$1500.00

No. 12E

Same as 11E, except all insulation removed.

All windows removed and boarded up.....\$1710.00

Nos. 13C-34C

inclusive have been entirely removed from
site.

Supporting concrete piers for house 13C-

18C inclusive have been removed or

upset\$79002.00

No. 35D Hospital

Outside dimensions 28'-1" x 31'-10".

All plumbing fixtures removed.

Electrical overhead fixtures missing in all
rooms except waiting room.

Wallboard missing or damaged in 30% of
wall surfaces.

Doors between various rooms removed.....\$1040.00

No. 48 G (Store Building)

We could not enter this building but the

structure seems to be intact except for

the overhead electrical fixtures which

are missing\$50.00

Plaintiff's Exhibit No. 4—(Continued)

Nos. 46D-47D

Two buildings labeled D on map numbered Nos. 46 and 47 seem to be one unit—this building was probably used as a postoffice. Contains two rooms—1 work room for employees and front room for public entrance—contains 6 windows and front and rear door. Dimensions 22'-5" x 36'-4". Building is intact, no fixtures missing with exception of 1 overhead electrical [109] fixture.

Estimated replacement cost.....\$5.00

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No. 36E

26'-11" x 27'-10". Labeled type E, but larger than group of houses numbered from 9 to 12 inclusive. All plumbing fixtures removed—kitchen cabinet and sink cabinet in place. There is one upstairs bedroom with stairway off rear bedroom. Open storage place upstairs not finished. Roof joists exposed and this over partly floored bathroom. Building in general is intact with above exceptions. Front porch 12 x 7 feet. Heating unit and fuel storage tank missing.\$850.00

Plaintiff's Exhibit No. 4—(Continued)

No. 37E

Same size as No. 36. Substantially same condition as No. 36 including the items mentioned in 36 that were missing. No access to upstairs here. Glass panel removed from front door and boarded up on inside. Corner boards missing.....\$855.00

No. 38E

Items mentioned in No. 36 missing here otherwise in same condition as 36 and 37.....\$850.00

No. 39E

Identical as preceding, with same exceptions as to items missing, no access to upstairs. Corner boards gone.....\$850.00

No. 40E

Same as above, fixtures as mentioned in 36 missing, no upstairs.....\$850.00

No. 41E

Same as No. 39.....\$850.00

No. 42E

Same as No. 39.....\$850.00

No. 43E

Same as No. 42 only glass in front door broken and boarded up.....\$855.00

No. 44E

Same as 42E.....\$850.00

Plaintiff's Exhibit No. 4—(Continued)

No. 45E

Same as 44E.....\$850.00

No. F Mess Hall

Building indicated on map as type F and labeled boardinghouse. Dimensions 37'-10" x 71'-4". This is the north wing, and contains Marlite wainscoting and approximately half of this wainscoting is missing. The wainscoting is 6½ feet high. This wing apparently contained the kitchen fixtures which have all been removed. In the northwest corner there is a small room about 4 x 5 which did contain some plumbing fixtures, probably a toilet and lavatory [111] which

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are missing. There is a basement under the northwest part of this wing, about 20 x 30 feet which seems to be intact. All heating units missing. 121'-9" x 41'-9" Dimensions of the main wing of the above mess hall. 37'-8" x 12'-11" Dimensions of the south wing of the above mess hall.

In general this building seems intact with the exception of the masonite wainscoting in the main portion of the building which has been partially removed.

Plaintiff's Exhibit No. 4—(Continued)

The panel for electricity is gone. Two
switch boxes removed in main section.

Estimated replacement cost exclusive of
kitchen fixtures & heating units.....\$525.00

No. 1B Barracks No. 1

Dimensions 26'-7" x 74'-2". Contains 10
sleeping rooms, 1 wash room on the
first floor and lobby. 11 sleeping rooms,
1 [112] wash room on the second floor.
Four lavatories and two water closets
removed from each floor. All heating
units removed, heating pipes still in
place. All else intact with the exception
of two overhead fixtures in lobby out...\$2370.00

No. 2B Barracks No. 2

Same size and same condition as above.....\$2370.00

No. 3B Barracks No. 3

Same size and same condition as above.....\$2370.00

No. 4B Barracks No. 4

Same size and same condition as above.....\$2370.00

Fire House

Dimensions 46'-2" x 25'.

Same in good condition.

House No. 49E

26-9/10' x 27-9/10' (House No. 246).

Missing Plumbing fixtures and fittings.

(Locked & unable to get inside.)

Plaintiff's Exhibit No. 4—(Continued)

Kitchen sink, lavatory, water closet, bath
tub & fittings.

Medicine cabinet.

Heater and oil storage tank.

Estimated replacement cost.....\$800.00

No. 50 E (House No. 247)

Same as 49E.....\$800.00

No. 51E (House No. 248)

Same as 49E.....\$800.00

No. 52E (House No. 249)

Same as 49E.....\$800.00

No. 53E (House No. 250)

Same as 49E.....\$800.00

No. 54E (House No. 251)

Same as 49E.....\$800.00

No. 55E (House No. 252)

Same as 49E.....\$800.00

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House No. 56E (House No. 253)

Same as 49E.....\$800.00

No. 57E (House No. 254)

Same as 49E.....\$800.00

No. 58E (House No. 255)

Same as 49E except living room and
kitchen.

Electrical fixtures missing.....\$850.00

Plaintiff's Exhibit No. 4—(Continued)

No. 59E (House No. 265)

Same as 49E except front door lock

missing\$805.00

No. 60E (House No. 264)

Same as 49E.....\$800.00

No. 61E (House No. 263)

Same as 49E.....\$800.00

No. 62E (House No. 262)

Same as 49E.....\$800.00

No. 63E (House No. 261)

Same as 49E (But not locked).....\$800.00

No. 64E (House No. 260)

Same as 49E.....\$800.00

No. 65E (House No. 259)

Same as 49E.....\$800.00

No. 66E (House No. 258)

Same as 49E.....\$800.00

No. 67E (House No. 257)

Same as 49E.....\$800.00

No. 68E (House No. 256)

Same as 49E.....\$800.00

No. 69E (House No. 268)

Same as 49E.....\$800.00

No. 70E (House No. 267)

Same as 49E.....\$800.00

Plaintiff's Exhibit No. 4—(Continued)

No. 71E (House No. 266)

Same as 49E.....\$800.00

No. 72E (House No. 274)

Same as 49E except half of insulation
board on porch ceiling missing.....\$810.00

No. 73E (House No. 274)

Same as 49E except front door lock
missing\$805.00

No. 74E (House No. 273)

Same as 49E.....\$800.00

No. 75E (House No. 272)

Same as 49E.....\$800.00

No. 76E (House No. 271)

Same as 49E.....\$800.00

No. 77E (House No. 270)

Same as 49E.....\$800.00

No. 78E (House No. 269)

Same as 49E.....\$800.00

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No. 11A (House No. 297)

Duplex 30'-6" x 24'-6" deep.

Kitchen sink, water closet, lavatory, medi-
cine cabinet, shower stall, all fittings

& heating missing from each apt.

- Oil storage tank missing.....\$1400.00

Plaintiff's Exhibit No. 4—(Continued)

No. 12A (House No. 298)

Same as No. 11A.....\$1400.00

No. 13A (House No. 299)

Same as No. 11A.....\$1400.00

No. 14A (House No. 300)

Same as No. 11A.....\$1400.00

No. 18A (House No. 296)

Same as No. 11A.....\$1400.00

No. 17A (House No. 297)

Same as No. 11A.....\$1400.00

No. 16A (House No. 294)

Same as No. 11A.....\$1400.00

No. 15A (House No. 293)

Same as 11A—

South half of No. 293 was open.....\$1400.00

No. 19A (House No. 276)

Same as No. 11A.....\$1400.00

No. 20A (House No. 277)

Same as No. 11A.....\$1400.00

No. 1A (House No. 317)

Same as No. 11A.....\$1400.00

No. 2A (House No. 318)

Same as No. 11A.....\$1400.00

No. 3A (House No. 319)

Same as No. 11A.....\$1400.00

Plaintiff's Exhibit No. 4—(Continued)

No. 4A (House No. 320)

Same as No. 11A.....\$1400.00

No. 5A (House No. 321)

Same as No. 11A.....\$1400.00

No. 6A (House No. 312)

Same as No. 11A.....\$1400.00

No. 7A (House No. 313)

Same as No. 11A.....\$1400.00

No. 8A (House No. 314)

Same as No. 11A.....\$1400.00

No. 9A (House No. 315)

Same as No. 11A.....\$1400.00

No. 10A (House No. 316)

Same as No. 11A.....\$1400.00

Very truly yours,

J. G. LINK & CO.

EFL/bj [116]

ELMER LINK

resumed the stand and testified as follows:

Cross-Examination

By Mr. Lennon:

Q. Mr. Link, the replacement valuations you testified to this morning and as contained in this Plaintiff's Exhibit 4 are based on valuations as of the date that you made the inspection of the prem-

(Testimony of Elmer Link.)

ises, is that correct? A. Yes, that is correct.

Q. I believe you stated that your firm among other things has been engaged in making estimates of buildings already constructed, is that right?

A. That is correct.

Q. What type of estimate making, as to value or replacement?

A. Both types. The times you are called on to go into a building and remodel a building and you are called upon to determine whether it is feasible to remodel that building, and if the cost is too much according to your estimates, the owner does not wish to go ahead with the project. Sometimes we are called upon to figure the cost for resale purposes.

Q. Purpose of arriving at resale price?

A. That is right.

Q. Now I am going to refer to Plaintiff's Exhibit 4 and ask you with reference to buildings No. 1 through 12; there [117] are 11 buildings, correct?

A. That is correct. The 8th is out.

Q. The 8th is out. So with reference to 11 buildings, 1 through 12, you inspected all of those, is that correct?

A. I inspected buildings 9 through 12. Mr. Loners inspected buildings 1 through——

Q. Well you collaborated together?

A. That is right.

Q. So between the two of you you did examine 1 through 12? A. That is correct.

Q. All the plumbing fixtures were removed and

(Testimony of Elmer Link.)

practically all the inside was taken out, partitions and everything else, is that correct?

A. Those buildings were in worse condition, more damage occurred to those buildings than to the remaining.

Q. I am going to refer to building No. 35, that is the first aid building, do you recall that?

A. The hospital; I didn't know it was a first aid building.

Q. So that building No. 35 and the other 11 were about in the same general condition, is that correct?

A. No, that is not correct. The building 35 was quite a bit larger building.

Q. I mean as to what was taken out? [118]

A. The buildings 9 to 12 which I examined myself I would say the character probably a little worse than building 35.

Q. A little worse? A. Yes.

Q. But is a correct statement, is it not? What I am trying to do now is break the whole situation down to three categories for the buildings 1 through 11, and building No. 35 had in addition to all the fixtures removed, had some of the building proper removed, is that correct?

A. That is correct, partitions removed, wallboard removed, some of the floor torn up and insulation.

Q. Now with reference to the 22 buildings, being buildings No. 13, 14, 15, then they jump over to—I beg your pardon. With reference to buildings No. 13, 14, 15 and then jumping over to 19 through to

(Testimony of Elmer Link.)

34, inclusive, those were all removed, correct?

A. Yes, entirely removed from the site.

Q. So we now get to the second classification, 22 buildings removed from the premises?

A. Yes.

Q. Naturally you didn't see those buildings and you don't know what those were like?

A. That is correct.

Q. You don't know what fixtures were in them?

A. No more than assuming. [119]

Q. That is the second classification. Now with reference to all the other dwelling buildings, were they in more or less of the same condition?

A. Generally, yes.

Q. With the exception of a minor item here or there?

A. Some of the wallboard might be in places busted and some of the insulation missing, but as a general category the first group of houses were in very bad state of repairs.

Q. We know the first category they were equipped? A. Yes.

Q. And then the second category the buildings were removed, right? A. That is right.

Q. And then the third category fixtures removed generally speaking? A. Generally speaking.

Q. Except for minor items now we go to the fourth classification, including store, post office, bunk houses, and mess halls, they were stripped of their fixtures, weren't they?

(Testimony of Elmer Link.)

A. The heating units and lavatories.

Q. Just a minute. They were stripped of their fixtures with relation to partitions and what not, is that correct?

A. I will answer it in this way. The fixtures generally were missing, as far as the heating and plumbing fixtures; the partitions and wallboards and floors were generally intact. [120]

Q. All these special buildings I have just mentioned were practically in the same condition as the other family dwellings, right?

A. I wouldn't say that. The character of the dwelling units which we did not take into consideration there was considerable more damage done to the walls on the removal of the plumbing fixtures. I am talking of the third category, the larger single family units, there was more damage done when they removed the fixtures than they did in the larger buildings for some reason. I don't know why that was.

Q. Now I am going to refer you to the second page, you will notice 13 on—I believe it is the third page, item 13C on through 34C. You have that in mind, sir?

A. Yes, sir.

Q. That represents the 22 buildings that have been removed?

A. Correct.

Q. Correct?

A. Yes.

Q. And you state in your letter that they were removed and you put a value on those at \$79,002, is that right?

A. That is right.

(Testimony of Elmer Link.)

Q. Was that based upon what you saw in other buildings or not?

A. We assumed that those buildings for the purposes of [121] our estimate they were the same size as the smaller unit, the 24 by 25 unit, or 24'-3" by 25'-3" I believe that unit was.

Q. Now will you turn to page 5 and I direct your attention to house No. 49 E. Do you have that?

A. Yes.

Q. With relation to that particular house in your statement here you took that as the basis for figuring, as a means of convenience to figuring the value of 50E through 78E, that is correct, isn't it?

A. Generally, yes.

Q. They were all in the same condition?

A. They were all in the same condition.

Q. So you used the same item of damage?

A. That is right.

Q. So that when we speak of 49E here we are talking about not only 49E but 50E through 78E, correct?

A. 78E, yes, generally speaking, except for the items we specifically mention that we could see.

Q. Now 49E then you have put a replacement value on it of \$800.?

A. Which is an understatement.

Mr. Lennon: Well I didn't ask you that. I move to strike that out. [122]

Q. You put down there \$800?

A. That is correct.

(Testimony of Elmer Link.)

Q. Now that represents the replacement value of these items, kitchen sink, lavatory, water closet, bath tub, medicine cabinet, heater and oil storage tank and fittings, correct? A. Yes.

Q. That those items just mentioned it would cost \$800 to replace them in these dwellings, correct?

A. Correct.

Q. Did you see the heater and oil storage tank that was in those houses?

A. About three years ago.

Q. Oh, you visited these premises once before?

A. Yes, I was over there about three years ago. May I add something further that as far as the unit, I visited the unit immediately after it was constructed and I don't exactly recall the heating unit but I do recall the oil storage tank.

Q. On the basis of what you recall three years ago you have included in here heater and oil storage tank in the figure of \$800, right?

A. That is correct, yes.

Q. Will you describe that heater and oil storage tank, please?

A. No, I can't describe the heater. As I recall it though it was an upright heater and the oil storage tank I [123] believe was a 300 gallon tank.

Q. Outside the building?

A. Yes, outside the building.

Q. They were in every one of the dwelling buildings?

A. The rack for the heater when we made our

(Testimony of Elmer Link.)

last visit to the site, or for the oil storage tank was still in place.

Q. For the tank? A. For the tank.

Q. Was there any evidence inside the building what type heater was in there?

A. Well, it was an oil burning heater we assume.

Q. What room was it located in?

A. It was in the living room.

Q. What?

A. Off the kitchen in the living room just adjacent to the kitchen.

Q. Do you recall what the cooking facilities were in these dwelling houses? A. No, I don't.

Q. Would it make any difference in your estimate if the oil unit in there for which the tank was placed outside the building was not a heater but a cooking stove; would that change your figure here?

A. Not necessarily. You will find that with a heater for that type to produce that much heat to heat the whole [124] house they only used a single heater would run about the same amount of money. That is for the purpose of our estimate.

Q. How much?

A. An oil heater of that type now retail price would probably run about \$75.

Q. \$75? A. Yes.

Q. And there is an installation charge, I suppose? A. Oh, yes.

Q. What would that run about not counting

(Testimony of Elmer Link.)

shipping; if it was right up there, what would that cost?

A. You are asking a very rough question, depending upon——

Q. I can see it is rough if you don't know what it is.

A. But I would say it would probably run you \$25 to install that by the time you run that pipe under and make fittings and connections. You would have \$150 in the whole unit we figured.

Q. What kind of heating unit was there intalled in the mess hall? I believe that is on page 5.

A. As far as the heating units I saw no evidence of heating units. That is one thing was not in there, the heating units; it was steam heated.

Q. You have a statement here "All heating units missing?"

A. That is it.

Q. I presume that was included in the figure \$525? [125]

A. No.

Q. What does that item include?

A. That was just damage to wallboard, and I do know there was some plumbing fixtures missing in the northwest corner of the building. As far as heating units and kitchen equipment that was not, it was not taken into consideration at all for the purposes of this estimate.

Q. I would like to go back to page 5 again on that house 49E, which we use as a sample here. Can you break that figure down of \$800 for any building?

(Testimony of Elmer Link.)

A. Well, I can try. My figures as anyone will tell you——

Q. Just break it down.

A. The missing plumbing fixtures and fittings. Now then for the actual price on the plumbing fixtures——

Q. That is what I want.

A. Would probably run you in the neighborhood of \$300.

Q. That is what you would have to pay for them down here in Billings?

A. That is just outright buying, purchasing. And then you would have to connect those fixtures up. You would have to lead the fittings, and whatever type fittings you use you have got the trim and your labor would probably run another \$450 and by the time you figured your contractor's profit in there which varies from 10 to 50%——

Q. 10 to what? [126]

A. It varies from 10 to 50%, depends on who you get to do the work. Those bathrooms would run you from \$750 to as high as \$1100 with the kitchen fixtures.

Q. Well you got them in here for \$800?

A. That is right.

Q. You don't want to change that, do you?

A. No, this in a conservative figure. We know this could not be replaced.

Q. So we will not have any misunderstanding this is the figure you are submitting to the court for

(Testimony of Elmer Link.)

the allèged injury for removal of these fixtures from the building, and I presume this \$800 figure is what you are telling the court is the replacement value of these fixtures, right?

A. It is a mis-interpretation. These figures are actually a conservative figure. It is what we know to be safe to say that with these figures or it would be very unlikely you would get anyone to replace these items for that amount of money. There is the possibility that you might.

Q. What you are saying on this particular building, which applies to any of the others, that you could go and buy the fixtures to replace the ones taken out for approximately \$300?

A. That is right.

Q. And that it is going to cost \$450 to put the kitchen sink, lavatory, water closet and bath tub and medicine cabinet [127] in plus the heating unit?

A. I am quoting the going rate and that is all I can quote.

Q. What I am interested in, Mr. Link, is what you as an expert—what is the value of installing these \$300 worth of fixtures?

A. What I said is \$450. I don't believe you can do it for less than that. The going rate on installations of a similar five-room houses is \$900. Of course, that includes soil pipe. Soil pipe comes to \$1.50 a foot.

Q. I haven't seen it and you have. Let's take

(Testimony of Elmer Link.)

the bath tub. We pay for it out of the \$300. And here it is up outside of the building and it is ready to be put in 49E building. And when I say the cost of installation is bringing it in, putting it in position, and taking pipes already there and connecting it right on to the tub. Now that is what I am asking you to tell this court here, what is the cost to install these bath fixtures mentioned in that letter in building 49E after they are paid for? Mind you you have already said you assume the pipes are running up through the floor there?

A. It depends on the character of the work. It appears to us some of that was just pulled out. Now you have a certain amount of wallboard and lumber removed.

Q. Mr. Link, I am just going on what you said here on 49E. You described this to the court as to condition of the [128] condition of the plumbing fixtures and fittings, kitchen sink, lavatory, water closet, and bath tub. Now there is what's missing. Assume that to be the fact that this is what is missing, just those items you have placed there. Now what I want to know, they are right outside the building, to go in and tie them in, how much would it cost? Is that what you mean when you say \$350?

A. That is an old building. I will refer to it again. It depends on the condition of this pipe you are going to hook on to. Now in this particular case and a building being constructed and roughing in the pipe would be much higher to do than a new

(Testimony of Elmer Link.)

building to go and tear out the partition work and wood and lumber and then come back in and put the new pipes in and which would have to be done. So I say this on that premises I say that \$450 for the entire bathroom would probably cover.

Q. You mean for the entire building?

A. Bathroom and kitchen because they are back to back.

Q. And when you take a kitchen sink out you uncouple it from the pipes and move it out?

A. That is right.

Q. And you do the same thing in reverse when you put in in? A. That is right.

Q. I notice that on page 3 on the post office you have [129] just a small item of \$5.00 for an electrical fixture? A. That is correct.

Q. What type of electrical fixture?

A. That was a porcelain lamp holder.

Q. Did you ever see it in there?

A. I assumed it to be the same type fixture as the rest in the rest of the building.

Q. I thought there weren't any fixtures in any of the buildings?

A. Let's see, that \$5.00, that was on page 3. That is 46D—47D which is building, post office building. That is really one building and apparently as I saw it to be or was used as a post office.

Q. Would your estimate of that be different if all there was was an electric light bulb?

A. Yes.

(Testimony of Elmer Link.)

Q. As a matter of fact on all electrical fixtures it depends on the type electrical fixtures?

A. Most of the fixtures were porcelain lamp holders but what they had done on this particular fixture they cut the wires so I didn't—

Q. How do you know most of the fixtures were porcelain lamps?

A. The fixtures I saw were porcelain lamps.

Q. Where did you see them? [130]

A. We saw them in the hospital and I think there were some in the mess hall yet and there were a few in some of the houses.

Q. Are you able to state, Mr. Link, the sales value of these houses that you have inspected up there in place where they are located up at the Mouat mine?

A. Would I be in position to?

Q. Can you?

A. In other words, if those houses were sold to be moved out of there, is that the question?

Q. No, I am not asking you that. I am asking you can you state the market value of those houses in place at the Mouat mine? Can you do that? I am not asking you how to do it but whether you can or not answer it yes or no with reasonable qualification.

A. Yes and no. If they were here I could answer it here but I can't answer it up there. I know values here and in cities.

Q. But you don't know the value up there?

A. I know cost to reconstruct.

(Testimony of Elmer Link.)

Q. No, I am not asking the cost. I say market value. A. No.

Q. Is it because you have never had occasion to go into the value of a house 90 miles up in the mountain on a mine site? That is one of the reasons, isn't it? [131] A. No.

Q. I believe you stated on direct examination that you gave an off site value for these buildings, didn't you? A. That is correct.

Q. And also the figure — correct me — between \$800 and \$1,000? Am I correct in that?

A. Between seven and eight hundred.

Q. Between seven and eight hundred off site value without the—as you saw them up there generally speaking?

A. That would be my offhand estimate.

Q. And I am not referring to this first section of houses but the ones to the northwest which had just fixtures removed; you say they have between seven and eight hundred dollars off site value?

A. I would say that, yes.

Q. And you say the fixtures in there have off site value of approximately \$300?

A. Probably, yes.

Q. And I believe you said that that would be the high bid that you would get for this type of house?

A. If a contractor was going up there and bid that and move them off there, yes.

Q. In other words, a bid is a pretty good indica-

(Testimony of Elmer Link.)

tion of what their off site value it, isn't that correct, sir?

A. Depends upon the purposes for which you wanted to [132] use the buildings for. The value is established by the person who desires the building.

Q. By that I mean you own the buildings and you want to sell them and everybody comes in and bid and I bid \$800 you would sell them to me, and that don't you think that would be a fair value established for off site irrespective of what I was going to do with them? You sold them. You were the owner.

A. In the present condition, yes.

Q. Mr. Link, can you state whether or not the houses as you found them at the Mouat mine as you inspected them, can you state whether or not they have a market value where they are right now as they are now located?

A. Yes, they do have.

Q. I don't mean for off site value. I mean for use in place. They have a market value up there at the Mouat mine today in the place as they are?

A. Do I have to answer that in one word or two words?

Q. Either you can state it or you can't.

A. Definitely I myself feel they do have better market value up there than they do here.

Q. They have a market value in place up there?

A. Sure they have.

(Testimony of Elmer Link.)

Q. On what do you base that?

A. You want my own opinion. If the buildings were to [133] be sold and that I could use them myself?

Q. Up there? A. Yes, definitely.

Q. What could you use them for?

A. You could use them for a Dude ranch or health center.

Q. Let's assume you wouldn't be allowed to put a Dude ranch there because the land was only unpatented land and could be used for mining purposes only?

A. Then you would have to look in to see if you could get a patent.

Q. Assuming you couldn't get a patent?

Mr. Maury: We object. He is propounding the question which is a most serious one. In this case the landlord is presumed to have the title and the tenant can not in any way impeach him.

The Court: Well, that is a general proposition of law.

Mr. Lennon: I concede. I am not asking it for that purpose, your Honor. The fact has come out by Mr. Mouat's testimony he has an unpatented mining claim here. Now that is the fact as it stands up until now and I am asking the witness whether or not that has a market value in place under the present conditions.

The Court: Well he thinks it has and has given

(Testimony of Elmer Link.)

you the reasons for it. I will sustain the objection if that [134] is what you are waiting for.

Q. (By Mr. Lennon:) Are there any industries—what is the nearest industry to the Mouat townsite?

A. Well, the nearest industry to the Mouat townsite I would say mining or I would say Dude ranching. Dude ranching is nearest as to the actual—

Q. Where is that located?

A. That is located four miles above Mr. Mouat's ranch.

Q. What other use could you put these buildings to in place there?

A. Depending upon the mining which I am not—which I don't pretend to know anything about.

Q. Other than mining?

A. Well, just offhand those two. Those are two items that I would myself would like to have those buildings for.

Q. But you wouldn't want them for any other purpose, would you, in place?

A. I wouldn't know but probably—

Mr. Lennon: That is all. [135]

Redirect Examination

By Mr. Shone:

Q. Mr. Link, the heater and oil storage tank you spoke of, how were they connected?

A. Well, they were on a piping system. They

(Testimony of Elmer Link.)

weren't connected when we were up there.

Q. No, but you were up there about three years ago and you saw them at that time?

A. Yes, I saw the unit as it was constructed, although it was three years.

Q. Yes, but how were they connected up, the storage tank outside with the heater inside?

A. It was directly connected to the house on a piping system.

Q. And both were connected together so the oil from the original tank would flow to the heater inside the house?

A. Yes, gravity system.

Q. And what did the storage tank rest upon?

A. Those were 4 by 8's. I believe they were.

Q. On the outside of the house?

A. 4 by 8's or 4 by 6's. I didn't particularly notice but I believe they were 4 by 6's.

Q. When you were up there three years ago at that time were these houses built at that time, all of them? [136]

A. Mr. Mouat took me to one or two of them. I think we went into the duplex. We went into the duplex and we went into one of the single family dwelling units.

Q. In reference to those marked "C" that are now destroyed, were they up there when you were up there, do you remember?

A. It seems to me they started that construction from this lower corner. As to whether or not the row there were up and some of those buildings, the

(Testimony of Elmer Link.)

buildings in the rear I think that No. 9 and 12 buildings were there and I believe the rest of them were under construction.

Q. You mean the first buildings constructed here starting with 1? A. No, this third row.

Q. Oh, the third row.

A. Yes, as I recall it now. And then the duplex. There was a duplex constructed because I went into the duplex.

Mr. Shone: That is all.

Redirect Examination

By Mr. Lennon:

Q. So you are making this, giving this figure here to include oil heaters or what you saw up there three years ago, is that correct? [137]

A. No, I am not. I am making—we made our estimate knowing that there was an oil storage heater in there and the heater had to be large enough to take care of that, and the cheapest heater you can get there would cost you \$50. The very cheapest to give any heat at all. And we know that the storage tank from other witnesses I have talked to, or other people I have talked to was a 300 gallon tank. Now the rack that is there is for a 300 gallon tank, and all we can do is assume when a thing is missing.

Q. What is the cheapest oil cooking range?

A. I am not familiar with that.

Q. You wouldn't be able to give any value on

(Testimony of Elmer Link.)

that? I am talking about an oil cooking range which has a pipe running outside to a tank; you are not familiar with that?

A. We have never installed one.

Q. How long have you known Mr. Mouat?

A. Oh, about 27, 28 years, I guess.

Q. And when you went up there last week was there any chain across the road stopping you?

A. No. You mean chain? You mean stop sign? Or the word "stop" on anything?

A. No, any part of the road where you found a chain stretched across it and locked so you couldn't proceed?

A. No, sir.

Q. None when you went up there that day? [138]

A. There was a chain across that road but it wasn't for that purpose. It was to hold a truck on the road. There was a chain just across the road as you described it.

Q. Was there any chain stretched across the road for impeding your progress up the hill to the townsite?

A. No chain put there specifically for that purpose.

Q. Then there was no chain to impede your progress going up that hill, right?

A. No, that isn't right because there was a chain and that might impede your progress.

Q. In what way?

A. The chain was hooked on a tree and this trailer had gone over the bank.

Q. For the purpose of pulling this truck up?

(Testimony of Elmer Link.)

A. Yes. There was snow on the ground and it could impede and it could impede, an ordinary person going up there wouldn't have gone across that.

Q. And was that a permanent installation?

A. No, just a temporary thing.

Q. But other than that there was no chain stretched across the road to stop you from going up?

A. No.

Q. With a lock on it? A. None, no.

Q. In other words, this chain you are talking about could [139] happen out on the highway, it was a temporary proposition? A. Yes.

Mr. Lennon: That is all.

Mr. Shone: Are you contending Mr. Mouat had the right of way?

Mr. Lennon: No.

Mr. Shone: I thought that you were contending you had given Mr. Mouat possession.

Mr. Shone: May Mr. Link be excused.

Mr. Lennon: Yes.

The Court: If you gentlemen are through with him.

HARRY LONERS

resumed the stand and testified as follows:

Cross-Examination

By Mr. Lennon:

Q. Mr. Loners, you were in the court room and heard the last witness on cross-examination?

A. Yes, I did.

(Testimony of Harry Loners.)

Q. And to save time here your answers are about the same as Mr. Link's? A. Yes, sir.

Q. Do you want to vary it in any respect?

A. There were one or two times when you mentioned all the houses where I would have, I wouldn't have agreed to all [140] the houses, all the dwelling units. There were dwelling units for single families and dwelling units that housed more than one family; there would be a distinction there in those instances.

Q. But other than that why you have nothing to change, to add to change the testimony as given by the last witness? A. Nothing.

Mr. Lennon: That is all.

Redirect Examination

By Mr. Shone:

Q. In the duplexes there were two separate sets of plumbing? A. That is true.

Q. Where in the single there would be one set of plumbing?

A. One set of plumbing in the single and one set of kitchen equipment and heating equipment and cooking equipment.

Q. But the duplex is used for two families?

A. That is right.

Q. And each would have separate cooking?

A. They are complete units in themselves with the one wall.

Q. One building with a set of walls between to separate the two families? [141]

(Testimony of Harry Loners.)

A. That is right.

Mr. Shone: That is all.

Recross-Examination

By Mr. Lennon:

Q. You know Mr. Link's father?

A. Yes, I do.

Q. He is one of the parties in this trust agreement of Mrs. Mouat's, isn't that correct?

A. I don't know.

Mr. Lennon: That is all.

Mr. Lennon: If the court please, I would like to ask Mr. Link that question if I may, please. That last question.

The Court: All right, inquire.

ELMER LINK

resumed the stand and testified as follows:

Recross-Examination

(Continued)

By Mr. Lennon:

Q. Mr. Link, is your father one of the parties to the trust agreement in which Mrs. Mouat is trustee in this law suit? [142]

A. My father is interested in a good many—

Q. Pardon.

A. My father is interested in a good many mining propositions and oil and I am under oath here and I couldn't say.

(Testimony of Elmer Link.)

Q. You wouldn't say he isn't?

A. There is a lot of his business I don't know anything about.

Q. You wouldn't say he is not interested in this mine?

A. I can say this honestly I don't know his affiliations as far as a lot of his oil holdings and mining.

Q. I mean as far as Mouat?

A. No, I say I can't say that because I honestly don't know.

Mr. Maury: For your satisfaction it is admitted he is or was one of the cestui que trust.

Mr. Lennon: That is all.

MALCOLM WILLIAM MOUAT

resumed the stand and testified as follows:

Cross-Examination

By Mr. Lamb:

Q. Mr. Mouat, in December, 1941, when this lease was executed you lived on the place marked "Residence" on Plaintiff's Exhibit 1, did you not?

A. Yes, sir.

Q. Did you live there at all times during the operation of the mine? I mean after the Metals Reserve took it over?

A. Yes, that is my home.

Q. And during the time that they first started

(Testimony of Malcolm William Mouat.)

the construction up here at the townsite did you go up there occasionally to look and see how they were coming along? A. Many times.

Q. Then after they finished this new road around over to tunnel 5 and tunnel No. 2, I believe isn't it; did you go up to what property is known as the mine site and those tunnels?

A. The first road did not go that far.

Q. I know the first road didn't, but when they finished that road did you go up to tunnel 5 and tunnel 2 quite a number of times?

A. Yes, I did but then some of that road, the end of that road from the Lake there was not finished, went on different roads. There was a couple roads there right up that same hill side.

Q. As a matter of fact the old road went up to a nickel mine, did it not, somewhere over on the east side of the colored portion of Plaintiff's Exhibit 1?

A. Do you want to know where that road went?

Q. Yes, if you will, please.

A. Our home is down in here. [144]

Q. You are now pointing at a place marked "Residence" on Plaintiff's Exhibit 1?

A. And the first road come along up in here.

Q. The witness indicated a straight line between the point marked "Residence" just to the south of the point marked "Mill" and to the general direction of the place marked "Dump site." All right, from the dump site where did it go?

(Testimony of Malcolm William Mouat.)

A. Down here to the old smelter, up this way and up in here. That was the first road that we had in the early days thirty years ago.

Q. The witness has pointed generally to the horse shoe curve appearing on the new road just east of, just south of the dump site, then westerly on a line called, or marked on the map as Jame Roadside, and then generally south westerly to a point approximately south of a line marked 45,000, a point near the south west corner of section 21, township 5 south, range 15 east, which is indicated on the map with a cross, and the nickel, the site of the nickel mine was just generally in that area, was it not?

A. Up in there.

Mr. Lamb: That is all; take your chair.

Q. Then until the Government or the Metals Reserve took this lease there was no road from a point just west of the dump site up to what is known as the Mouat town site or to the tunnel 5 and tunnel 2 or Lake Placer claim? [145]

A. Yes, there was a road.

Q. There was? A. Yes.

Q. Where did that road come from?

A. May I show you on the map?

Q. Yes.

A. This whatever you call this point right here, well Smelter site right in here was Anaconda warehouse. From there we turn that way roughly two city blocks and then we ramble on up a steep grade here until we got to a point on Mountain View,

(Testimony of Malcolm William Mouat.)

which is this claim here, and then come around here to tunnel No. 2. That was that road. Now part of that road took a six wheel drive automobile to get up there.

Q. Then at a point adjacent to the point marked on Plaintiff's Exhibit 1 called "Dump site" there is no place on the balance of the new highway that the Metals Reserve put in that crosses or is adjacent to the old road that you had previously constructed upon those premises?

A. They used a part of that road to get up to that point above the dump site.

Q. Up to the dump site but above that and beyond that there is no point where the new road and the old road are even close together?

A. Oh, just 100 or 200 feet there from right here, right in there just above this. [146]

Q. And that old road is that open?

A. Well it is still open but rains and many things have washed down there to dilapidate it.

Q. You didn't maintain it, keep it up?

A. No, I had no caterpillar.

Q. Well then as I understand it, Mr. Mouat, from the time that the Metals Reserve took over this particular lease, executed the lease with you and started operations, that you many times went up to the Mouat town site and also over around tunnels 2 and 5 during the time there were actual mining operations going on and construction work?

A. Yes.

(Testimony of Malcolm William Mouat.)

Q. You were kind of checking on them to see what they were doing, weren't you?

A. Not necessarily. I have my own business on other property there but I watched them the best I could.

Q. Well you were interested in it and wanted to know what was going on?

A. Absolutely.

Q. Then during all of the time up to the present time you have been up there a great number of times since that lease was signed?

A. Yes.

Mr. Lamb: That is all. [147]

Redirect Examination

By Mr. Maury:

Q. Mr. Mouat, you spoke of a Mr. Nicely being in charge of the upper camp since March 1st; he was not a servant of yours, was he?

A. No, sir.

Q. He was representing someone else?

A. I presume the Government or Anaconda.

Q. But he was no servant of yours?

A. No.

Q. Mr. Mouat, you were asked if you had a telegram this morning that you sent to Mr. Brown on March 11th, 1946, is that a carbon copy of it?

A. What do you wish to know.

Q. Is that a carbon copy of the telegram?

A. That is a carbon copy of the telegram I sent him, but may I add?

(Testimony of Malcolm William Mouat.)

Q. Yes, you may add while they are looking at it.

A. Is that a plainer copy?

Q. No, that is another thing.

A. That telegram went out because the Army were tearing down houses below the fence that was used by Cahill-Mooney and others on the building around the mill country.

Q. I see, that didn't relate to this at all? [148]

A. That did not relate to this.

Mr. Maury: Then I withdraw the offer.

Mr. Maury: We offer in evidence a notice of action filed in the county where the property is, certified copy. *Lis pendens*.

Mr. Lamb: We have no objection.

The Court: You offer it in evidence?

Mr. Maury: Yes.

The Court: It may be received in evidence.

(Whereupon said Plaintiff's Exhibit No. 5, notice of action, offered and received in evidence, is a part of this record and is in words and figures as follows, to wit:) [149]

PLAINTIFF'S EXHIBIT No. 5

Office of County Clerk and Recorder, Stillwater
County, Montana

State of Montana,

County of Stillwater—ss.

I, Elsie E. Swan, County Clerk and Ex-Officio Recorder, in and for said County of Stillwater, in the State of Montana, do hereby certify that the

Plaintiff's Exhibit No. 5—(Continued)

attached instrument is a full, true and complete transcript of the Notice of Action Pending. May Paula Mouat, et al., vs. Reconstruction Finance Corp., which was filed in this office on the 28th day of September, A.D. 1946, at 9:00 o'clock a.m. and admitted to record in Book 27 of Misc. Page 239, Records of Stillwater County, Montana.

In Testimony Whereof, I have hereunto set my hand and affixed my seal of the office the 3rd day of November, A.D. 1947.

[Seal] /s/ ELSIE E. SWAN,
Clerk and Recorder.

By.....

In the District Court of the United States in and
for the District of Montana, Billings Division

No. 137321

MAY PAULA MOUAT and M. W. MOUAT, Wife
and Husband, and MAY PAULA MOUAT, as
Trustee of an Express Trust,

Plaintiffs,

vs.

RECONSTRUCTION FINANCE CORPORATION and WAR ASSETS ADMINISTRATION, an Agency of the United States of
America,

Defendants.

All Persons Take Notice:

The above-named plaintiffs in the above-named
Court, on Tuesday, the 17th day of September, 1946,

NOTICE OF ACTION PENDING

filed an action which is still pending against the
above-named defendants for the recovery of the
title and possession of all of the land herein described,
together with all of the improvements thereon, and all of the tenements, hereditaments
and appurtenances thereunto belonging.

The description of the said land is as follows:

Those certain patented quartz lode mining claims
situated in Township Five (5) South, Range Fifteen (15) East, M.P.M., in Stillwater County, Montana, known and described as:

Plaintiff's Exhibit No. 5—(Continued)

Bald Eagle—U. S. Lot No. 69-D

Mountain View—U. S. Lot No. 63-A

Rough Rock—U. S. Lot No. 63-B

Also, all those certain unpatented quartz lode mining claims situated in Township Five (5) South, Range Fifteen (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Stillwater County, Montana, in the records of the said county on the dates and in the respective books and on the respective pages, as follows:

Name. Date Cert. Recorded.

Adam—July 19, 1941, Book 24 Misc., Page 207.

Princtons—May 8, 1941, Book 24 Misc., Page 122.

Skunk—May 8, 1941, Book 24 Misc., Page 128.

Sampson—May 8, 1941, Book 24 Misc., Page 126.

Oldco—May 8, 1941, Book 24 Misc., Page 124.

Link—July 19, 1941, Book 24 Misc., Page 209.

Pete—July 11, 1918, Book 7 Misc., Page 122.

(Amended Cert.)—October 17, 1941, Book 24 Misc., Page 288.

Scully—July 11, 1918, Book 7 Misc., Page 122.

(Amended Cert.)—October 17, 1941, Book 24 Misc., Page 286. [152]

Denver—October 7, 1918, Book 7 Misc., Page 233.

(Amended Cert.)—October 17, 1941, Book 24 Misc., Page 291.

Old Lady—July 11, 1918, Book 7 Misc., Page 114.

Westlake—July 11, 1918, Book 7 Misc., Page 116.

Billie—October 17, 1918, Book 7 Misc., Page 242.

Plaintiff's Exhibit No. 5—(Continued)

Chas. F.—July 11, 1918, Book 7 Misc., Page 118.
(Amended Cert.)

Old Lady—October 17, 1941, Book 24 Misc., Page 289.

Chas. F.—Continued:

(Amended Cert.)—October 17, 1941, Book 24 Misc., Page 287.

Gap—July 31, 1941, Book 24 Misc., Page 219.

(Amended Cert.)—October 17, 1941, Book 24 Misc., Page 290.

Jame—October 3, 1941, Book 24 Misc., Page 271.

Soup—October 3, 1941, Book 24 Misc., Page 273.

Pine—October 2, 1919, Book 8 Misc., Page 167.

Also, all those certain unpatented quartz lode mining claims situated in Township Five (5) South, Range Fifteen (15) East, M.P.M., Stillwater County Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Park County, Montana, in the records of the said county on the dates and in the respective books and on the respective pages, as follows:

Name.	Date	Cert. Recorded.
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Smelter—	September 23, 1887,	Book Vol. 1, Quartz Locations, Page 25. [153]
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Smelter—	June 8, 1889,	Book Vol. 1, Quartz Locations, Page 420.
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Also, that certain unpatented placer mining claim, and that certain unpatented tunnel site situated in Township Five (5) South, Range Fif-

Plaintiff's Exhibit No. 5—(Continued)

teen (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Stillwater County, Montana, in the records of the said county on the dates and in the respective books and on the respective pages as follows:

Name. Date Cert. Recorded.

Lake Placer—July 16, 1940, Book 23 Misc., Page 400.

(Amended Cert.)—June 16, 1941, Book 24 Misc., Page 155.

Monte Alto Tunnel and Tunnel Site—August 13, 1918, Book 7 Misc., Page 159.

Also, all of the right, title and interest of said Lessors now owned, or which may be hereafter acquired, in and to those certain unpatented quartz lode mining claims situated in Township Five (5) South, Range Fifteen (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which were recorded in the office of the County Clerk and Recorder of said Stillwater County, Montana, in the records of said county on the respective dates, and in the books and on the respective pages as follows: [154]

Name. Date Cert. Recorded.

Mountain View Chrome Co. #1—September 22, 1939, Book 23 Misc., Page 43.

Plaintiff's Exhibit No. 5—(Continued)

Mountain View Chrome Co. #2—August 31, 1940,
Book 23 Misc., Page 434.

Also, all water and water rights, ditch and ditch rights, flumes, easements, rights-of-way, permits from United States Forest Service, buildings and improvements upon, or used, or for use, in connection with the above-described premises.

Dated this 27th day of September, 1946.

THOMAS C. COLTON,
Stapleton Building,
Billings, Montana.

H. L. MAURY,

A. G. SHONE,

Attorneys for Plaintiff,
33 Hirbour Building,
Butte, Montana. [155]

Mr. Maury: Before we rest we ask leave to amend in paragraph 13 of the complaint line 1 instead of 1 building insert 22 of the residence buildings on the said land described, and in line 12 of that page that each of the said buildings already demolished by the defendants was even after the plumbing was removed of the value of \$600. And we ask leave to amend the prayer, the prayer from one building of \$600 by inserting each and 22 residence buildings. I state that that is a different condition of the evidence than it was at the time the suit was started.

(Testimony of Malcolm William Mouat.)

Mr. McKevitt: Your Honor, we have no objection to that. We will simply enter denial of it as our answer.

The Court: Very well, the amendment may be allowed. You want to amend the answer also; you deny it?

Mr. Lamb: Yes, your Honor. Your Honor, in our denial we deny all of that paragraph 13 in our answer, so I assume our answer would apply to this particular amendment.

Mr. Maury: There is another formal amendment. We stated all of the jurisdictional facts in the complaint but the rules prescribe that they shall be put in the first paragraph of the complaint and that is a very wise rule but we didn't obey it. I should have obeyed it. I offer this amendment to show jurisdiction and that it be called paragraph 1-A.

Mr. McKevitt: We noticed that at the time it was [156] filed and didn't make any objection. You should put your jurisdiction in the complaint.

Mr. Maury: I went to college to study a special course and then Congress took all my knowledge away but I did put in the facts; I knew enough substantive law to put the facts in.

Mr. McKevitt: I have no objection. I can't quite understand this but I have no objection to the amendment. I am not conceding it.

The Court: It may be amended.

Mr. Maury: We offer this as paragraph 1-A to the complaint. And possibly for the pleasure of

(Testimony of Malcolm William Mouat.)

the court one more bit of evidence and we will rest.

Redirect Examination

(Continued)

By Mr. Maury:

Q. Mr. Mouat, is that a correct photograph of the Lake and the Lake Placer and the buildings as they existed at the period prior to March 1st, 1946?

A. Yes, sir.

Mr. McKevitt: Would you be more definite in describing the date?

Q. In the fall of 1945 would that be correct?

A. Yes, that would be a very correct picture.

Mr. McKevitt: I understood you to say in the fall of 1945?

Mr. Maury: Yes, in the fall of 1945.

Mr. Lamb: We have no objection to that, your Honor.

The Court: Very well.

(Whereupon, said Plaintiff's Exhibit No. 6, being a picture of Mouat camp, offered and received in evidence, is a part of this record.)

The Court: What is the elevation?

The Witness: 6800.

Mr. Maury: Plaintiff rests.

Mr. Lamb: Your Honor, I still have a little cross-examination.

The Court: Very well.

Recross-Examination

By Mr. Lamb:

Q. Mr. Mouat, as I understand this particu-

(Testimony of Malcolm William Mouat.)

lar photograph marked Plaintiff's Exhibit 6 was taken along some time in the fall of 1945, is that correct? A. I don't get that.

Mr. Maury: He said it was a correct representation.

Mr. Lamb: I will handle my cross-examination, Mr. Maury, thanks.

Q. (By Mr. Lamb): When was the picture taken, do you know?

A. No, I do not. It was taken for the Government, enlarged for the Government so the gentleman that gave it to me told me.

Q. And you don't know when it was taken?

A. No.

Q. Was there any additional construction after this particular photograph in this area shown here? A. I don't think so.

Q. And that this was the conditions as you testified that were found in the fall of 1945?

A. Yes, and when they quit building we have thousands of pictures of different parts of that town and different angles and airplane pictures.

Q. This is not an airplane picture?

A. No, it was taken with a very cheap camera.

Q. Mr. Mouat, since February 28th, 1946, you received a notice of cancellation, did you not, on or about that date?

A. I think that is the date, yes.

Q. All right, after that date were you ever up on this particular property other than the day or two you testified to?

(Testimony of Malcolm William Mouat.)

A. Many, many times.

Q. And did you actually go up to tunnel 5 and tunnel 2 after February 28th up to the present time?

A. Oh, yes, many times.

Mr. Lamb: That is all.

Mr. Maury: That is all.

Mr. Maury: Plaintiffs rest. [160]

Mr. McKevitt: Your Honor, the defendant moves for judgment dismissing the complaint on the grounds plaintiff's proof has not established his cause of action.

The Court: Well, the court will take that under advisement. You may proceed with your defense.

Mr. McKevitt: If the court please, in outlining the defendant's case we started as I explained yesterday with two or three issues in this case. The first question is the issue of royalties, Reconstruction Finance Corporation paying minimum royalties for the years 1944 and 1945. That is after War Production Board had told them to cease production at the present time. That was practically a matter of law. But in order to establish action taken by War Production Board action to Reconstruction Finance Corporation I have certified copies of documents which show that picture. This first document is certified copy, under the Act of Congress, of letter from Mr. Batcheller, Operations Vice Chairman, War Production Board to The Secretary of Commerce in which the Secretary of Commerce acting for Reconstruction Finance Corporation was instructed to cease operations at the

Mouat Mine. I might read just the last paragraph:

“In view of the present stringent manpower situation and the lack of need for Montana concentrates as outlined above, we believe it advisable to divert the men now employed in mining low grade chrome concentrates in Montana into the production of more critically needed materials such as copper and zinc. [161] We, therefore, request that you shut down all operations at the Benbow and Mouat-Sampson properties except for such maintenance men as are necessary to keep both mines and mills in sufficiently good condition so that either or both operations could be revived in the event that the chromite picture should change for the worse.”

Mr. McKevitt: In other words, telling them to cease operations but keep it in standby condition.

Mr. Maury: Are you offering it?

Mr. McKevitt: I am offering it.

Mr. McKevitt: Your Honor, this is a series. Perhaps I had better have it marked for identification. Are you going to object?

Mr. Maury: Yes, certainly.

Mr. Maury: I take it the court will rule later on all these objections but it is incumbent upon us to make them specifically as they come.

The Court: Yes.

Mr. Maury: We object to the introduction of the Defendant's Exhibit No. 7. Not that it is not properly certified, your Honor. We are not basing any objection on the certificate because the certi-

fication is according to the rule. But section 24 of the lease does not absolve upon a mere request. "Section 24. Anything in this lease contained to the contrary notwithstanding, any strike, lockout, difference with workmen, accident, fire, explosion, flood, earthquake, embargo, mobilization, war, foreign war, hostility, riot, requirement, regulation, restriction or other act of any government or governments, whether legal or otherwise, acts of public enemies, the elements, force majeure, inability to secure or delay in securing cars, labor, raw materials, fuel or other supplies or materials or electric power necessary for the operation of the leased premises or the operation of Lessee's facilities, failure of the ore supply or loss of the ore body in the said leased premises or inability to secure sufficient ore of the grade required for concentrating from the said leased premises, unforeseen metallurgical or milling delays, delays or interruptions in transportation by rail, water or otherwise, damage to or destruction of such mines or plants or other operating facilities and any other contingency, whether or not of the nature or character hereinbefore specifically enumerated, which is beyond the control of Lessee or which delays or interferes with the performance of this agreement, shall be considered sufficient justification for delay in such performance until such cause ceases to exist." [163]

Mr. Maury: Now that a request is not something beyond the control of the lessee, the Met-

als Reserve or the Reconstruction Finance Corporation, and this letter is not shown to have been ever delivered to the Reconstruction Finance Corporation. It is addressed to The Honorable Secretary of Commerce, and is signed H. G. Batcheller, Operations Vice Chairman. And we further object that it is not relevant because paragraph 24 granting everything it says is repugnant to the main purposes of the lease, that is to say, \$10,000 a year minimum royalty as long as the lease was in existence.

Mr. Lamb: If the court please, as Mr. McKevitt stated, this is merely one item of a series to show the authority and control of the Federal Government over the particular operations here, and as Mr. Maury has stated in paragraph 24 the lessee is relieved by reason of other act of any Government or Governments. And we are showing through a series of the acts of a Government, the United States Government, that lead to the shutdown and the holding of this particular property as surplus. And this is merely one exhibit of a series to show the chain in which that particular order came. We have about fifty different exhibits that will show every major detail and every minor detail of this particular chain, but we have picked the major ones that will show the chain rather than encumber [164] the record with a whole group.

Mr. McKevitt: Your Honor, it comes to this, a lot of it is a matter of law and not matter of proof.

The Court: That is true and it would be a matter of argument later on. I am not prepared to say it should be eliminated or should be received at this time subject to your objection. It may be material, may be something in them.

Mr. Maury: Yes.

The Court: And I think they should be received subject to your objection.

Mr. Maury: Subject to our objection to all of this line and we may specify further when the documents are submitted to us. We are sorry to delay matters but we do want to——

The Court: You may renew that objection in your argument and it will be considered.

Mr. Maury: As to the materiality of these documents.

Mr. Shone: And our objection goes to each one of these instruments.

The Court: I understand.

Whereupon said Defendant's Exhibit No. 7, being War Production Board letter dated September 13, 1943, by H. G. Batcheller, Operations Vice Chairman, to The Secretary of Commerce, Washington, D. C., is in words and figures as follows, to-wit: [165]

DEFENDANT'S EXHIBIT No. 7

(Certificate)

War Production Board, Washington, D. C.

September 13, 1943

Please Prepare Reply

For Mr. Jones

Signature

In reply refer to:

The Honorable

The Secretary of Commerce

811 Vermont Avenue, NW.

Washington, D. C.

My dear Mr. Secretary:

On September 4, 1943, Metals Reserve Company wrote us a letter outlining the present status of the Government's chromite operations in Montana at the Benbow and Mouat-Sampson properties and requested our recommendations concerning further development and production from these properties.

As a background for our recommendations it is perhaps desirable to review some of the history of these operations and the original reasons for our sponsorship.

Three years ago the entrance of Italy into the war greatly restricted our access to the important chromite deposits of Turkey, Yugoslavia, Greece and Cyprus through the withdrawal of all American shipping from the Mediterranean. While some British and neutral ships continued to move small quantities of ore it was clear that none of these sources could be considered safely accessible. At

Defendant's Exhibit No. 7—(Continued)

that time the Defense Commission [166] started negotiations for the development of chromite production from the Benbow property in Montana and asked Metals Reserve Company to take this property over and operate it.

During the spring of 1941 the OPM took further steps to stimulate production of chromite concentrates in Montana and negotiations were undertaken with owners of the Mouat-Sampson properties. At the same time Metals Reserve Company, United States Geological Survey and the Bureau of Mines were asked to explore the entire chromite belt in Stillwater and Sweetgrass Counties, Montana, to find out whether other properties warranted development. Except for the Benbow and Mouat-Sampson properties, nothing of interest was discovered.

When Japan attacked the United States the chrome supply picture, which had previously appeared serious enough to warrant vigorous exploration of the Montana chromite area and the putting into operation of one mine, became very much more critical. War with Japan immediately cut off one of the few remaining sources, the Philippine Islands, and gave every prospect of cutting off New Caledonia. Also, as late as the middle of 1942 the penetration of the Japanese fleet into the Bay of Bengal indicated the possible loss of Madagascar with consequent blockade of our only remaining large sources of chromite, Southern Rhodesia and the Union of South Africa. Under such

Defendant's Exhibit No. 7—(Continued)

circumstances there seemed to be no choice but to attempt to make the United States completely self-sufficient at almost any [167] cost. It was at that time the WPB asked Metals Reserve Company to build for maximum production of chromite concentrates from the Benbow and Mouat-Sampson properties.

This recast of the story is made to show that the very large investment by the Government in developing Montana chromite production was the natural reaction to a real threat which fortunately did not materialize. Had we lost Madagascar and New Caledonia and ready access to the Mediterranean as well, it is a fair assumption that we would now be producing chromite as fast as we could in Montana.

Actually in spite of all threats to our supply, and in spite of rising consumption, total stocks in the country rose from approximately 675,000 tons in the summer of 1940 to a peak of 1,200,000 tons in January, 1943. Since then they have declined only modestly to a total of 1,110,000 tons and a part of this decline has been due to the deliberate withdrawal of ships from the South African trade in order to help out the movement of other more scarce commodities.

It now seems more than probable that we will be able to continue to supply all of our chromite needs without calling upon any production from the Montana chromite deposits. It should be noted that the Montana chrome concentrates are very

Defendant's Exhibit No. 7—(Continued)

much inferior to imported grades of chromite. The Montana concentrates are of no value in the manufacture of refractory brick. In the manufacture of chrome chemicals they are enough [168] lower in grade than the Transvaal ores so that enforced use of Montana concentrates would lower the production of chromium chemicals seriously at a time when manpower conditions make it almost impossible to maintain full operation. For metallurgical purposes the ores are even more unsuitable and would require the erection of a costly beneficiation plant before any of them could be used. Therefore, it is not only impracticable to use the Montana concentrates at present but probably such use will never be necessary. We view the Montana chromite development now only as insurance against some future emergency in which case the existence of producing capacity is just as valuable as would be the existence of stockpiled production.

In view of the present stringent manpower situation and the lack of need for Montana concentrates as outlined above, we believe it advisable to divert the men now employed in mining low grade chrome concentrates in Montana into the production of more critically needed materials such as copper and zinc. We, therefore, request that you shut down all operations at the Benbow and Mouat-Sampson properties except for such maintenance men as are necessary to keep both mines and mills in sufficiently good condition so that either or both

Defendant's Exhibit No. 7—(Continued)
operations could be revived in the event that the
chromite picture should change for the worse.

Sincerely yours,

/s/ H. G. BATCHELLER,

Operations Vice Chairman.

Mr. McKevitt: This may take quite a while.

The Court: We will take a recess. You can
see all of them and let them be received subject
to your objection.

Mr. Maury: We can pick them out and specify
subject to our objection.

The Court: Yes.

(Whereupon said Defendant's Exhibits Nos.
8 to 21, inclusive (except Defendant's Exhibits
Nos. 18 and 19 having been later withdrawn),
are a part of this record, and are in words and
figures as follows, to wit:) [170]

DEFENDANT'S EXHIBIT No. 8

(Certificate)

War Production Board

Washington, D. C.

March 8, 1944

In reply refer to:

Ferroalloys Branch

Room 1412-A

Social Security

Building

Received March 11, 1944

D.P.C. Administrative

Division

Defendant's Exhibit No. 8—(Continued)

Mr. Hans A. Klagsbrunn
Executive Vice President
Defense Plant Corporation
Washington, D. C.

Dear Mr. Klagsbrunn:

With further reference to your inquiry as to whether we were interested in maintaining the Benbow and Mouat-Sampson chrome properties in Montana in stand-by condition, I am writing you to advise you that it is our decision to continue to hold these plants in stand-by condition.

We have, upon written request from Metal Reserve Company and also from Mr. A. W. Greely, Assistant Chief Engineer of Defense Plant Corporation, loaned some equipment for use at other essential government projects. However, this has been done only with a specific understanding that such materials are to be kept "ear-marked" and held available for return to the Benbow or Mouat operations, if we decide to re-open these properties.

Very truly yours,

/s/ OLAF N. ROVE,

OLAF N. ROVE

Ferroalloys Branch. [171]

DEFENDANT'S EXHIBIT No. 9

(Certificate)

War Production Board, Washington 25, D. C.

Oct. 6, 1944.

In reply refer to:

The Honorable

The Secretary of Commerce

811 Vermont Avenue, N. W.

Washington 25, D. C.

My dear Mr. Secretary:

In September, 1943, we recommended that Metals Reserve Company shut down the Benbow and the Mouat-Sampson Chrome Mines and Mills near Columbus, Montana. At the same time it was recommended that the facilities be held in stand-by condition as protection against a possible future emergency which might necessitate our reopening these operations.

There is some possibility that we may utilize, as an emergency substitute for Transvaal ores in case new imports of the latter are not available to the chemical industry, some of the present stocks of Benbow concentrates during the second half of 1945. These stocks plus Mouat-Sampson and Coquille, Oregon, concentrates will be sufficient, when "upgraded" with higher-grade concentrates, to last at least through 1945. In view of the present chrome ore supply position plus gradually improving shipping conditions, we no longer consider it essential to the present War Effort to maintain the Benbow Mine and Mill in stand-by condition. [172]

Defendant's Exhibit No. 9—(Continued)

We recommend that the Benbow Mine, Mill, and associated other facilities including the Benbow Housing Project, be declared as surplus property. We further recommend that the Mouat-Sampson Mine, Mill, and associated facilities continue to be held in a stand-by condition for the present, but upon termination of the European War, the chrome situation will be reviewed to determine whether the Mouat-Sampson can then be declared surplus property.

Sincerely yours,

/s/ PHILIP D. WILSON,

PHILIP D. WILSON,

Vice Chairman for Metal
and Minerals. [173]

DEFENDANT'S EXHIBIT No. 10

(Certificate)

War Production Board, Washington, D. C.

Feb. 24, 1945.

In reply refer to:

The Honorable

Charles B. Henderson

Chairman, Reconstruction Finance Corporation

811 Vermont Avenue, N. W.

Washington, D. C.

Dear Mr. Henderson:

Subject: Release of Facilities on Plancor 587

Anaconda Copper Mining Company

Columbus, Montana

Defendant's Exhibit No. 10—(Continued)

The four letters of January 29, 30, and February 6, 1945, written by Mr. R. G. Rhett, Chief, Industrial Facilities Section, Surplus War Property Division, Defense Plant Corporation, requesting the release of certain facilities on subject Plancor, have been noted.

This is to advise that this Agency recommends the continuation of a standby status of this Plancor as insurance against any possible emergency.

However, as the Plancor can be placed in operation without the hospital equipment and additional mine timber, it is suggested, therefore, that Defense Plant Corporation make such disposition of these two facilities as it may deem appropriate.

Sincerely yours,

J. A. KRUG,

Chairman

By /s/ ROBERT A. IRWIN,

ROBERT A. IRWIN,

Director, Procurement Policy
Division.

Attachment [174]

DEFENDANT'S EXHIBIT No. 11

(Certificate)

War Production Board, Washington, D. C.

Apr. 14, 1945.

In reply refer to:

The Honorable

Charles B. Henderson, Chairman

Defendant's Exhibit No. 11—(Continued)

Reconstruction Finance Corporation

811 Vermont Avenue, N. W.

Washington, D. C.

Subject: Anaconda Copper Mining Company,
New York, New York.

Location of Project: Mouat-Sampson Chrome
Mine, Columbus, Montana.

Description: Facilities for Production of Chrome
Ore.

Present Authorization: \$8,358,890.00.

Plancor No. 587.

Dear Mr. Henderson:

The Mouat-Sampson Chrome Mine was developed through federal financing by the Anaconda Copper Mining Company, acting as agents for Metals Reserve Company, with a lease agreement dated February 24, 1942. The present authorization is \$8,358,890. The objective of this Plancor was to develop a supply of low grade chrome ore, which could be utilized in an emergency.

The Mouat-Sampson Mine, mill and related facilities have been shut down and maintained in a standby condition since December 31, 1943. There is a large amount of mining and [175] milling equipment on this Plancor, most of which has been used only a short time, that is urgently needed for other operations.

As the facilities pertaining to this Plancor are not now necessary for the war effort, this Agency

Defendant's Exhibit No. 11—(Continued)
suggests that the Defense Plant Corporation make such disposition of these facilities as it may deem appropriate.

Sincerely yours,

J. A. KRUG,

Chairman

By /s/ ROBERT A. IRWIN,

ROBERT A. IRWIN,

Director, Procurement Policy
Division.

Attachment [176]

DEFENDANT'S EXHIBIT No. 12

(Certificate)

War Production Board, Washington 25, D. C.

November 2, 1945

In reply refer to:

Dear Mr. Henderson:

On July 8, 1941, the Office of Production Management, in a letter from Mr. E. R. Stettinius, Jr., to the Honorable Jesse H. Jones, Federal Loan Administrator, requested that the Defense Plant Corporation and the Metals Reserve Company proceed with negotiations for the production of chromite from the so-called Mouat-Sampson properties in Stillwater County, Montana, a project considered of high importance to the defense program. In due course lease arrangements for these properties were completed by the Metals Reserve Company and arrangements were made for the Anaconda Copper Mining Company to develop and operate these

Defendant's Exhibit No. 12—(Continued)

mines. Facilities for the operation were provided by Defense Plant Corporation (now the Office of Defense Plants) under Plancor No. 587.

On April 14, 1945, the War Production Board advised your office that the facilities pertaining to Plancor No. 587 were no longer necessary for the war effort, and suggested that Defense Plant Corporation make such disposition of these facilities as it might deem appropriate.

It has recently been brought to our attention by the Office [177] of Metals Reserve that, in the absence of a specific recommendation from the War Production Board, no action has been taken to terminate the lease for the properties on which this project is located. The operation of these properties is not required to satisfy either military or civilian demands. It is therefore recommended that the Office of Metals Reserve take such action with respect to the lease for the Mouat-Sampson Chrome Mine properties as it may deem appropriate.

Sincerely yours,

/s/ J. A. KRUG,

J. A. KRUG,

Chairman.

The Honorable

Charles B. Henderson

Acting Federal Loan Administrator

Federal Loan Agency

811 Vermont Avenue, N. W.

Washington 25, D. C. [178]

DEFENDANT'S EXHIBIT No. 13

(Certificate)

Metals Reserve Company

Washington, D. C.

Apr. 8, 1944

Mrs. May Paula Mouat,
Mr. M. W. Mouat, and
Mrs. May Paula Mouat, as Trustee
Columbus, Montana

Dear Mr. and Mrs. Mouat:

Our Supervising Engineer, Mr. Cecil B. Hull, at Columbus, Montana, has written us that you recently inquired of him when you "might expect the first quarter minimum royalty payment" under our Lease dated December 20, 1941.

Under date of December 11, 1943, we informed you that, pursuant to action taken by the War Production Board, operations at the Mouat-Sampson properties had been suspended.

Section 7 of the Lease calling for payment of minimum royalties provides that should our mining or milling operations or any other operation be suspended because of any of the causes or reasons set forth in section 24, our obligation to pay a minimum royalty shall be suspended during any and all periods were such causes or reasons exist and the obligation to pay such minimum royalty shall be reduced in such proportion as the period of suspension of operations bears to the entire calendar year. [179]

Section 24 provides, among other things, that

Defendant's Exhibit No. 13—(Continued)

anything in the Lease to the contrary notwithstanding, any requirement, regulation, restriction or other act of any government, whether legal or otherwise, force majeure, inability to secure or delay in securing labor, and any other contingency which is beyond our control or which delays or interferes with the performance of the agreement shall be considered sufficient justification for delay in such performance until such cause ceases to exist.

As you know, the War Production Board is empowered to exercise general direction over the war procurement and production program to determine the policies, plans, procedures and methods of the several federal departments, establishments and agencies in respect to war procurement and production and to issue such directives in respect thereto as are deemed necessary or appropriate; its decisions are final and all federal departments, establishments and agencies are required to comply therewith.

As advised in our letter of December 11, 1943, during the time operations are suspended, we will continue to keep the mine and mill in such condition that operations can be resumed upon request of the War Production Board.

Very truly yours

/s/ HDS

H. DeWITT SMITH,

Executive Vice President.

ASH:LM

File Copy [180]

Defendant's Exhibit No. 13—(Continued)
Metals Reserve Company
Washington 25, D. C.

Dec. 11, 1943.

Registered Mail—
Return Receipt Requested

Mrs. May Paula Mouat,
Mr. M. W. Mouat, and
Mrs. May Paula Mouat, as Trustee,
Columbus, Montana.

Dear Mr. and Mrs. Mouat:

In a letter dated September 13, 1943, discussing the chrome situation in general and the chrome projects undertaken by Metals Reserve Company in Montana in particular, in connection with the war effort of the Government of the United States, the War Production Board stated that, in view of the present stringent manpower situation and the lack of need for Montana concentrates, it believed it advisable to divert the men now employed in mining low grade chrome in Montana into the production of more critically needed materials. The War Production Board therefore requested us to shut down operations at the Mouat-Sampson properties, covered by the lease from you dated December 20, 1941, and also to shut down operations at the Benbow Mine, except for such maintenance men as are necessary to keep both mines and their respective mills in sufficiently good condition so that either or both operations could be revived in the event that the chromite picture should change for the worse. [181]

Defendant's Exhibit No. 13—(Continued)

As you know, Metals Reserve Company, as a federal agency created to aid the Government of the United States in the national defense program and war effort, is obligated to comply with the policies, plans, methods and procedures in respect to war procurement and production as determined by the Chairman of the War Production Board. Under the circumstances Metals Reserve Company has complied with the above mentioned directive and has suspended all operations in and about the premises covered by the above mentioned lease and commonly known as the "Mouat-Sampson properties." A crew of men is being maintained to protect the property. Like action has also been taken in respect of the Benbow Mine.

Very truly yours,

METALS RESERVE
COMPANY

By

G. TEMPLE BRIDGMAN

Executive Vice President

ASH:LM

File Copy

[182]

DEFENDANT'S EXHIBIT NO. 14

(Certificate)

War Production Board

Washington, D.C.

July 5, 1943

Office of

DONALD M. NELSON

Chairman

Dear Mr. Jones:

Mr. Ralph J. Cordiner has resigned as Vice Chairman of the War Production Board, Mr. Donald D. Davis has taken his place, and Mr. Hiland G. Batcheller has taken the position of Operations Vice Chairman.

Accordingly, this will cancel, effective today, the authorization given to you for Mr. Cordiner, and will instruct you to accept the signatures of Mr. Donald D. Davis as Vice Chairman and of Mr. Hiland G. Batcheller as Operations Vice Chairman on recommendations that are made by the War Production Board to the Reconstruction Finance Corporation and its subsidiaries.

Sincerely yours,

/s/ D. M. NELSON

DONALD M. NELSON

Honorable Jesse Jones

Secretary of Commerce

Washington, D. C. [183]

Defendant's Exhibit No. 14—(Continued)

War Production Board
Washington, D. C.

Dec. 17, 1943

In reply refer to:

The Honorable
Secretary of Commerce
811 Vermont Avenue, N. W.
Washington, D. C.

Dear Mr. Secretary:

On July 5, I authorized you to accept the signature of Mr. Hiland G. Batcheller as Operations Vice Chairman, War Production Board, on recommendations to the Reconstruction Finance Corporation and its subsidiaries.

Mr. Batcheller has resigned and Mr. L. R. Boulware has been appointed Operations Vice Chairman. This will authorize you to accept Mr. Boulware's signature, which appears below, in place of Mr. Batcheller's.

Sincerely yours,

/s/ C. E. WILSON

C. E. WILSON

Executive Vice Chairman

/s/ L. R. BOULWARE

L. R. BOULWARE

Operations Vice Chairman

Defendant's Exhibit No. 14—(Continued)

War Production Board

Washington, D. C.

Jan. 7, 1944

Office of Donald M. Nelson, Chairman

Dear Jesse:

The new position of Vice Chairman for Metals and Minerals was created in the War Production Board of December 23, 1943. Mr. Arthur H. Bunker was appointed to the post on the same date. Accordingly, this will authorize you to accept, as of December 23, 1943, Mr. Bunker's signature as Vice Chairman for Metals and Minerals on recommendations from the War Production Board to the Reconstruction Finance Corporation and its subsidiaries with respect to the matters outlined in my letter to you of November 16, 1942.

For your guidance, please be advised that recommendations to close down a Defense Plant Corporation plant, to cancel a Defense Plant Corporation lease or other management agreement, or to cancel or modify a materials purchase program should be accepted when made by those War Production Board officials now authorized to recommend the construction, lease, agreement, or purchase, as the case may be.

Sincerely yours,

/s/ D. M. NELSON

DONALD M. NELSON

Honorable Jesse Jones

Secretary of Commerce

Washington, D. C. [185]

Defendant's Exhibit No. 14—(Continued)
War Production Board
Washington, D. C.

June 20, 1944

In Reply Refer to:

Dear Jesse,

On January 7, 1944 I informed you that Mr. Arthur H. Bunker had been appointed to the position of Vice Chairman for Metals and Minerals of the War Production Board.

Mr. Bunker is leaving this post, and his place is being taken by Mr. Philip D. Wilson. Accordingly this will authorize you to accept, as of June 20, Mr. Philip D. Wilson's signature as Vice Chairman for Metals and Minerals.

Sincerely yours,

/s/ D. M. NELSON

DONALD M. NELSON

Honorable Jesse Jones
The Secretary of Commerce
Washington, D. C. [186]

War Production Board
Washington 25, D. C.

February 3, 1945

In reply refer to:

Dear Mr. Secretary:

I have authorized Mr. Robert A. Irwin, as Director of the Procurement Policy Division of the War Production Board, to approve in my name recommendations made by the War Production Board to the Reconstruction Finance Corporation or its

Defendant's Exhibit No. 14—(Continued)
subsidiaries for the financing by the Defense Plant Corporation of specific projects, involving construction of plants, acquisition of machinery and equipment, and installation of specific facilities, or plant acquisition or rehabilitation.

This will authorize you, therefore, to accept the signature of Mr. Irwin, in his named capacity, on recommendations of the kind described above. His signature, for your records, appears below. All previous delegations which include authority to approve and sign recommendations of the kind described above have been amended to exclude such authority.

Sincerely,

/s/ J. A. KRUG,
J. A. KRUG,
Chairman.

(Signed)

ROBERT A. IRWIN

ROBERT A. IRWIN

The Honorable

The Secretary of Commerce

Washington, D. C.

War Production Board

Washington, D. C.

February 24, 1945

In reply refer to:

Dear Senator Henderson:

This is in reply to your letter of January 27, 1945, requesting a revised list of those officers of the War

Defendant's Exhibit No. 14—(Continued)

Production Board authorized to sign recommendations to the Reconstruction Finance Corporation or its subsidiaries. This letter supersedes all previous letters with respect to signature authorizations covering recommendations made by the War Production Board to the Reconstruction Finance Corporation or its subsidiaries.

I. The signature authorizations of Harold Boeschstein, Operations Vice Chairman, and Philip D. Wilson, Vice Chairman for Metals and Minerals, are to be recognized in connection with the following principal categories of recommendations:

(1) for the purchase of materials or their release to industrial consumers;

(2) for payments on over-quota production of copper, lead or zinc;

(3) for the financing of programs for the redistribution of materials;

(4) pertaining to the operations of a DPC facility. [188]

II. The signature authorization of Edward J. Browning, Director of the Bureau of Stockpiling and Transportation, is to be recognized in connection with recommendations involving purchasing of materials or commodities or their release to industrial consumers.

Defendant's Exhibit No. 14—(Continued)

III. The signature authorization of Robert A. Irwin, Director of the Procurement Policy Division, is to be recognized in connection with recommendations for the financing of a specific project involving construction of plants, acquisition of machinery and equipment, installation of specific facilities, or plant acquisition or rehabilitation by the Defense Plant Corporation. He will also advise the Defense Plant Corporation that a specific project or facility is no longer essential for war production.

IV. The signature authorizations of Robert A. Irwin, Director of the Procurement Policy Division and John G. Hager, Chief of the Requisitioning Branch of the Procurement Policy Division, are to be recognized in connection with recommendations made under the requisitioning acts as more fully set forth under my Delegation of Powers to them dated December 19, 1944, a copy of which is attached to this letter.

V. The signature authorization of J. Joseph Whelan, Recording Secretary, is to be recognized on allocations of materials to individual purchasers.

VI. In addition the appropriate Bureau or Division [189] Director my advise the R. F. C. subsidiaries with respect to the release of materials purchased and held by them to individual consumers where the material is no longer under allocation.

The signature authorization of Hiland G. Batcheller, Chief of Operations, is to be recognized in connection with any recommendation addressed by

Defendant's Exhibit No. 14—(Continued)
the War Production Board to the Reconstruction
Finance Corporation or its subsidiaries.

Very truly yours,

/s/ J. A. KRUG,

J. A. KRUG, '
Chairman.

Honorable Charles B. Henderson
Chairman of the Board
Reconstruction Finance Corporation
Washington, D. C.

Attachment [190]

DEFENDANT'S EXHIBIT No. 15

(Certificate)

Nov. 15, 1945

Registered Mail—

Return Receipt Requested

Mrs. May Paula Mouat, Mr. M. W. Mouat
and Mrs. May Paula Mouat, as Trustee,
Columbus, Montana

Dear Mr. and Mrs. Mouat:

Pursuant to Public Law 109, 79th Congress, approved June 30, 1945, Metals Reserve Company was dissolved effective July 1, 1945, and all of its functions, powers, duties and authority, together with its documents, books of account, records, assets and liabilities of every kind and nature were transferred to Reconstruction Finance Corporation to be performed, exercised and administered by Reconstruction Finance Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation.

Under date of November 2, 1945, the War Production Board wrote us that the operation by us of the properties covered by the lease from you dated December 20, 1941, is not required to satisfy either military or civilian demands. Therefore, Reconstruction Finance Corporation hereby gives notice of its intention to surrender, terminate and cancel, and does hereby surrender, terminate and cancel that certain lease dated the 20th day of December, 1941, covering certain mining property in Stillwater

Defendant's Exhibit No. 15—(Continued)

County, Montana, wherein you are Lessors [191] and Metals Reserve Company is Lessee, said surrender, termination and cancellation to be and become effective on February 28, 1946.

As provided in paragraph 14 of the lease, we are making payment of the sum of \$1,000 to the Yellowstone Bank, Columbus, Montana, for payment by said Bank to Mrs. May Paula Mouat, as Trustee. Enclosed is copy of our letter to the Yellowstone Bank.

For your information, please be advised that we are also cancelling our lease from Dr. Edward Sampson.

Very truly yours,

RECONSTRUCTION FINANCE
CORPORATION,

By,

Executive Director,

Office of Metals Reserve.

Enclosure

ASH:LM

File Copy

Please attach enclosed receipt to File copy of our letter dated November 15, 1945, addressed to May Paula Mouat, M. W. Mouat and May Paula Mouat, as Trustee.

* * *

(Defendant's Exhibit No. 15—(Continued)
Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

/s/ MAY PAULA MOUAT.

M. W. MOUAT

(Signature or Name of
Addressee.)

.....

(Signature of Addressee's Agent—Agent Should
Enter Addressee's Name on Line One Above.)

Date of delivery, 11-19-1945.

* * *

Post Office Department.

Penalty for private use to avoid payment of postage \$300.

Postmark of Delivering Office.

Return to Reconstruction Finance Corporation.

Street and Number or Post Office Box. Name
of Sender 666.

Registered Article 786814.

Insured Parcel.

Washington, D. C.

73-a Mr. Hutchinson. [193]

DEFENDANT'S EXHIBIT No. 16

Executive Order

Transferring Functions of the Federal Loan Agency
to the Department of Commerce.

Whereas by an Executive order issued this date

Defendant's Exhibit No. 16—(Continued)

under Title I of the First War Powers Act several agencies were transferred from the Federal Loan Agency to the National Housing Agency established by such order, and it is deemed advisable that the remaining functions of the Federal Loan Agency be administered in the Department of Commerce;

Now, therefore, by virtue of the authority vested in me by Title I of the First War Powers Act, 1941, approved December 18, 1941, it is hereby ordered as follows:

Sec. 1. Transfer of Functions. All functions, powers, and duties of the Federal Loan Agency and of the Federal Loan Administrator which relate to the Reconstruction Finance Corporation, Electric Home and Farm Authority, RFC Mortgage Company, Federal National Mortgage Association, Disaster Loan Corporation, Export-Import Bank of Washington, Defense Plant Corporation, Rubber Reserve Company, Metals Reserve Company, Defense Supplies Corporation, and War Insurance Corporation, together with all other functions, powers, and duties not transferred by the Executive order establishing the National Housing Agency, are transferred to the Department of Commerce and shall be administered under the direction and supervision of the Secretary of Commerce. [194]

Sec. 2. Transfer of Records, Property, and Personnel. All records and property (including office

Defendant's Exhibit No. 16—(Continued)

equipment) and all personnel of the Federal Loan Agency used in the administration of the functions transferred by this order are transferred to the Department of Commerce for use in the administration of the functions transferred by this order.

Sec. 3. Transfer of Funds. So much of the unexpended balances of the appropriations, allocations, or other funds available or to be made available for the use of the Federal Loan Agency in the exercise of any function transferred by this order, as the Director of the Bureau of the Budget with the approval of the President shall determine, shall be transferred to the Department of Commerce for use in connection with the exercise of the functions so transferred. In determining the amount to be transferred the Director of the Bureau of the Budget may include an amount to provide for the liquidation of obligations incurred against such appropriations, allocations, or other funds prior to the transfer.

Sec. 4. Effective and Termination Dates. This order shall become effective as of the date hereof and shall continue in force and effect until the termination of Title I of the First War Powers Act, 1941.

FRANKLIN D. ROOSEVELT.

The White House,

February 24, 1942.

No. 9071

DEFENDANT'S EXHIBIT NO. 17

(Certificate)

Telegram

Metals Reserve Company
Washington, D.C.

September 16, 1943

Via Commercial Wire

Anaconda Copper Mining Company
Attention C. E. Weed, Vice President
Butte, Montana

Upon request of War Production Board and in view of general chrome position and present general manpower shortage we ask you to proceed as follows re Benbow and Mouat-Sampson operations.

1. Close down Benbow mine and plant completely, maintaining guards and otherwise seeing that property is properly protected.

2. Close down Mouat mine as quickly as orderly transfer of personnel to more critical mineral production will permit with view of stopping milling approximately November first. Maintain sufficient men to keep entire plant in operating condition and underground working in good repair. All arrangements of shut-down should be such that production

Defendant's Exhibit No. 17—(Continued)
can be resumed with reasonable promptness upon
notice from us to reopen. Letter follows.

G. TEMPLE BRIDGMAN

Executive Vice President

Metals Reserve Company

WWL-ASH:LM

File Copy

[196]

Metals Reserve Company

Washington, D. C.

September 22, 1943

Mr. C. E. Weed

Vice President

Anaconda Copper Mining Company

Butte, Montana

Dear Mr. Weed:

The War Production Board notified us on September 13, 1943 that in view of the stringent manpower situation and the lack of need for Montana concentrates under existing circumstances, they believe it advisable to divert the men now employed in mining low grade chrome concentrates in Montana into the production of more critically needed materials such as copper and zinc. The Board therefore requested that we "shut down all operations at the Benbow and Mouat-Sampson properties except for such maintenance men as are necessary to keep both mines and mills in sufficiently good condition so that either or both oper-

Defendant's Exhibit No. 17—(Continued)

ations could be revived in the event that the chromite picture should change for the worse." Accordingly, we telegraphed you instructions on September 16 to accomplish this purpose.

You will note that the request of the War Production Board does not differentiate between Benbow and Mouat as to the extent of maintenance during the shut-down, whereas the instructions of our wire of September 16 are not identical for the two operations. We believe that our instructions will accomplish fully the War Production Board's intent, in that if need arises Benbow can be put in operating condition after Mouat has attained [197] capacity production.

As regards Benbow, we concur with the procedure outlined in paragraphs "(a)", "(b)" and "(c)" of your letter of September 4, 1943, and ask you to proceed, generally, in this manner. You appreciate, however, that careful regard must be given to Paragraph 27 of the Benbow lease dated May 27, 1941, and Paragraph 13 of the Timmins Agreement of same date. Before making any tender of supplies or equipment, please furnish us with a list of the items which you recommend to be sold, together with the undepreciated and depreciated value of each item. Items owned by Metals Reserve Company should be listed separately from items owned by Defense Plant Corporation. Any supplies or pieces of equipment which are to be removed from Benbow and stored at Mouat should be properly labeled for easy identification as having

Defendant's Exhibit No. 17—(Continued)

been removed from Benbow, and Defense Plant items should be stored separately from Metals Reserve items.

If operations at either or both of the mines are to be renewed at some future time, we are of opinion that attention first should be given to the opening of Mouat. Therefore, we are inclined to dispose of only such supplies and equipment of Mouat as could properly be classed as "surplus" in relation to operations on a basis of 2,000 tons per day. Perishable and supplies and equipment which could be replaced quickly are excepted from the foregoing. As in the case of Benbow, [198] please furnish us with your detailed recommendations in this regard.

The question arises at this time as to whether it will be advisable to carry through from level to level a stope or two in both the "G" and "H" veins, as suggested by Mr. Browning. We should like to see this done if it can be conveniently fitted in with the general shut-down program. We shall appreciate your views in this regard.

Sincerely yours,

G. TEMPLE BRIDGMAN

Executive Vice President

WWL:MLO

CC—Mr. Bridgman

Mr. Smith

Mr. Levinson

Mr. A. S. Hutchinson

Defendant's Exhibit No. 17—(Continued)

Mr. A. W. Greely (DPC)

Mr. Norton

Mr. Petterson

Mr. Bancroft

Mr. Browning

Mr. Lynch

File Copy

[199]

Telegram

Metals Reserve Company

Washington, D. C.

September 27, 1943

Via Commercial Wire

Anaconda Copper Mining Company

Butte, Montana

Re our telegram September sixteenth. We are of opinion obligation pay minimum royalties Benbow Mouat is suspended and we request that until otherwise advised by us you suspend such payments from and after effective dates of respective shutdown and during period of such shutdown. Leases provide obligation pay minimum royalties shall be suspended during periods where a cause such as request of War Production Board exists and obligation pay such minimum royalties shall be reduced in such proportion as period suspension bears to entire calendar year. We understand no quarterly minimum royalties payable September thirty in

Defendant's Exhibit No. 17—(Continued)
any event is earned royalties ample to meet provisions of leases. Please confirm.

CHARLES B. HENDERSON

President

Metals Reserve Company

ASH:LM

File Copy

[200]

DEFENDANT'S EXHIBIT NO. 20

United States of America—Surplus War Property
Administration

Report of Surplus Real Property
erty

Form SWPA-5

Form Approved

8/1/44

Budget Bureau No. 16-R005

1. To: Reconstruction Finance Corporation, 811 Vermont Avenue, N.W., Washington 25, D.C.

2. From: Defense Plant Corporation, 811 Vermont Avenue, N.W., Washington 25, D.C.

3. Location (Attach map) State Montana, County Stillwater, Municipality Columbus.

4. Disposal Agency No.:.....

5. Authorized Reporting Official—Date: April 16, 1945—/s/ R. G. Rhett. Signature—R. G. Rhett, Chief, Industrial Facilities Sec.

Signature Title

6. Reporting Agency—No.: Plancor 587.

Defendant's Exhibit No. 20—(Continued)

7. Description of Property—General. See appendix attached.

8. Cost of Acquisition \$18,262.80. Estimated cost of Betterments \$8,318,400.

9. Use of Property when acquired—Mining. Opinion of Best Future Use—Mining.

10. Description of Government's Legal Title to Property. Title cleared—Yes [x] No. []. Fee simple title acquired by purchase and condemnation. Portion of facilities constructed on land held under mining claims.

11. Representatives to Contact—Mr. L. E. Choquette, Agent, P. O. Box 177, Helena, Montana, Tel. Helena 481. [201]

Defense Plant Corporation
Surplus War Property Division
Industrial Facilities Section

Plancor No. 587

Anaconda Copper Mining Company
Columbus, Montana

Facilities of this Plancor completely owned by DPC for the production and concentration of chromite ore. Mining claims are under lease agreement.

Property located on improved highway approximately 45 miles southwest of Columbus, Montana, which is the nearest railway shipping point and served by N.P.R.R.

Improvements: Millsite

Defendant's Exhibit No. 20—(Continued)

2000 ton Concentrator Building, table concentration, electric power, completely equipped for operation, sprinkler system, crushing plant, tank house, machine shop, warehouse, carpenter shop, automotive repair shop, metallurgical laboratory and bucking room, office building, 40 ton truck scales building, 1-six and 1 four-stall garage, mess hall, guest building, six bedrooms, first aid building, 1-twenty-bed hospital completely equipped, 2-five-room residences, 1-contagious disease building, community hall, store building, 1-two classroom school, 30-four-room dwellings, 17-three-room dwelling, and 39 temporary housing buildings.

Three phase 50,000 volt transmission line with sub-stations and [202] transformers. Metallic telephone line. Aerial Tramway, steel towers, between concentrator building and mine terminal with 48 bucket assemblies, capacity 1800 lbs. of chrome ore each, equipped for automatic dumping.

Improvements: Mine

Primary and Secondary Ore Bins and Crushing Plant, conveyor trestles and housing, compressor building, carpenter shop, blacksmith and machine shop, office and engineers building, mess hall, change house, warehouse, automotive repair shop, recreation building, 1-eight classroom school, first aid station and nurses' home, store building, post office building, 55-three-room dwellings, 40-four-room dwellings, 55-two-room duplex dwellings, 8-forty-two men, bunk houses; 1-garage and shop building with general repair room, service room;

Defendant's Exhibit No. 20—(Continued)

parts room and office located in Columbus, Montana; one truck storage building located in Columbus, Montana.

Complete mining equipment to develop and operate the mine on a 2000 ton per day production. Complete water and sewerage system; all buildings lighted by electricity; complete fire protection systems at Millsite and Mine.

For further information communicate with:

Defense Plant Corporation
Surplus War Property Division
Industrial Facilities Section
Washington 25, D.C.
L. E. Choquette, Agent
Defense Plant Corporation
P. O. Box 177
Helena, Montana [203]

— — — — —
DEFENDANT'S EXHIBIT NO. 21

11 Fed. Reg. P. 1265

The following is the text of Executive Order 9689, issued by the President on January 31, 1946:

Executive Order

Consolidation Of Surplus Property Functions

Whereas the Surplus Property Administration has now substantially completed the performance of its policy-making functions, the War Assets Corporation is now vested with the major part of domestic surplus property disposal, and the State Department is now vested with the major part of foreign surplus property disposal; and

Defendant's Exhibit No. 21—(Continued)

Whereas, after a reasonable period in which to make necessary administrative arrangements, it will be feasible and desirable to establish a War Assets Administration as a separate agency directly responsible to the President to exercise consolidated functions relating to the disposal of domestic surplus property;

Now, Therefore, by virtue of the authority vested in me by the Constitution and Statutes, including Title I of the First War Powers Act, 1941 (55 Stat. 838), and as President of the United States, it is hereby ordered as follows:

1. The functions of the Surplus Property Administrator and of the Surplus Property Administration are hereby transferred, except as otherwise provided herein, to the chairman [204] of the board of directors of the War Assets Corporation, and to the War Assets Corporation, respectively, and the Surplus Property Administration shall be deemed merged into and consolidated with the War Assets Corporation.

2. All functions of the Surplus Property Administrator and the Surplus Property Administration which relate to surplus property located outside the continental United States, Hawaii, Alaska (including the Aleutian Islands), and Puerto Rico, and the Virgin Islands are transferred to the Secretary of State and the Department of State,

3. Effective March 25, 1946, (a) there shall be respectively.

Defendant's Exhibit No. 21—(Continued)

established, in the Office for Emergency Management of the Executive Office of the President, a War Assets Administration at the head of which there shall be a War Assets Administrator, who shall be appointed by the President by and with the advice and consent of the Senate, and who shall receive a salary at the rate of \$12,000 per annum unless the Congress shall otherwise provide, and (b) the functions of the War Assets Corporation relative to surplus property and of the chairman of the board of directors of the War Assets Corporation relative to surplus property shall be transferred to the War Assets Administrator.

4. There shall be transferred to the agencies to which functions are transferred by this order so much as the Director of the Bureau of the Budget shall determine to relate primarily [205] to such functions, respectively, of the records, administrative property, personnel, and funds of the Surplus Property Administration the Office of War Mobilization and Reconversion, the Reconstruction Finance Corporation, and the War Assets Corporation. "All authorizations, commitments, or other obligations incurred as a disposal agency by the Reconstruction Finance Corporation or by the War Assets Corporation under the Surplus Property Act of 1944 shall be transferred to the War Assets Administration upon its establishment."

Defendant's Exhibit No. 21—(Continued)

5. There shall be subject to the Classification Act of 1923, as amended, those positions transferred to the War Assets Corporation hereunder which are now subject to the said Act, and also all positions transferred to the War Assets administration hereunder; provided that if the salary of the incumbent of any position so transferred to the said Administration is above the maximum of the allocated grade such salary shall not be reduced so long as the position is held by the incumbent. The provisions of section 1 hereof notwithstanding, the respective accounting and fiscal procedures in effect with respect to the functions merged shall continue in effect from February 1, 1946 to March 25, 1946.

6. Such further measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the transfers provided for in this order shall be carried out in such manner as the Director may [206] direct and by such agencies as he may designate.

7. All provisions of prior Executive orders in conflict with this order are amended accordingly. All other prior orders, regulations, ruling, designations, and other actions, relating to any function transferred by this order, shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

8. Nothing in this order shall affect the pro-

Defendant's Exhibit No. 21—(Continued)
visions of section 101 (c) of the War Mobilization and Reconversions Act of 1944 (58 Stat. 785), or of section 10 (b) of the Surplus Property Act of 1944 (58 Stat. 766).

9. The provisions of this order shall, except as otherwise herein specifically provided, be effective as of the opening of business February 1, 1946.

HARRY S. TRUMAN

The White House,
January 31, 1946

The following statement was released together with the Executive Order on February 1, 1946:

The foregoing Executive Order consolidates surplus property functions by combining both policy and disposal responsibilities into one agency which will handle more than 90 per cent of domestic surplus disposal. Under the order, almost all foreign surplus will be handled by the State Department. [207]

The order transfers the functions of the Surplus Property Administrator to the Chairman of the War Assets Corporation, effective until March 25. Beginning on that date a War Assets Administration will administer both the present surplus property disposal functions of WAC and the former functions of the Surplus Property Administration. Lieutenant-General E. B. Gregory, chairman of the War Assets Corporation, will be designated by the President as head of the new agency and his name will be sent to the Senate for confirmation.

Defendant's Exhibit No. 21—(Continued)

As the policy-making phase of the surplus property program has been substantially completed, there is no longer a need for a Surplus Property Administration in the Office of War Mobilization and Reconversion. W. Stuart Symington, Administrator, who urged the merger of functions, has been nominated as Assistant Secretary of War for Air, and resigned his SPA post as of February 1.

The order will have the effect of streamlining the organization of surplus property activities, by placing under single direction the functions of making and carrying out domestic surplus property policies. Until now, policies have been determined by the Surplus Property Administrator, while the bulk of disposal operations has been under the direction of the War Assets Corporation.

The President's order was issued under the First War Power Act. [208]

The President has directed the Board of Directors of the Reconstruction Finance Corporation to take necessary steps as soon after March 25 as practicable to dissolve the War Assets Corporation which was originally created as the Petroleum Reserves Corporation under the Reconstruction Finance Corporation Act. [209]

The Court then recessed until 3:30 o'clock p.m., at which time the parties and counsel were present.

The Court: Gentlemen, what have you done about the exhibits?

Mr. McKevitt: Your Honor, two of these exhibits are Federal Executive Orders, and two were

not in the Federal Registry which the Court would take judicial notice of. I think it is easier than to have to find it.

Mr. Maury: We have our same objection to offer No. 8.

Mr. Maury: We make our same objection to offer No. 9.

Mr. Maury: We make our same objection to offer No. 10.

Mr. Maury: We make our same objection to offer No. 11.

Mr. Maury: No objection to offer No. 12, except that it is admitted in the answer and alleged in the complaint. It is repetition.

Mr. Maury: Same objection to offer No. 13.

Mr. Maury: No. 14 is photostatic copies of six letters, none of which are to the merits, and we object for the same reason as our original objection to No. 7, and also that they are hearsay and not binding.

Mr. Maury: Our objection to No. 15 is it tends to [210] encumber the record and for the reason it is contained in the complaint and admitted in the answer.

Mr. Maury: Same objection to No. 16.

Mr. McKevitt: You agreed to putting executive orders in.

Mr. Maury: But it has no relevancy. I do not mean it shouldn't be called to the attention of the Court by some writing instead of asking us or the Court to look it up.

Mr. Maury: Same objection to each of the three documents in No. 17, telegram, letter and telegram.

Mr. Lamb: The next two exhibits may be withdrawn and not offered; they have previously been offered in a prior exhibit.

Mr. Maury: Which exhibits—18 and 19?

Mr. Lamb: Nos. 18 and 19.

Mr. Maury: We want to get the date on this one and we can't without untying something here.

Mr. McKevitt: The date appears here.

Mr. Colton: April 14, 1945.

Mr. Maury: We object to No. 20 for the reason it is not shown to refer to any of the property in the lease. If it is, we can't find it. We can't find any reference.

Mr. McKevitt: This is declaration of surplus, your Honor, of this plant or property. They use the word "Plancor" and this particular Plancor is described here, the mill and mine. [211]

Mr. Maury: Is that the mill?

Mr. McKevitt: This is Mouat.

Mr. Maury: Is it down at the mill or property embraced in the lease?

Mr. McKevitt: This as far as declaring surplus would be at the mill and the rest of it.

Mr. Maury: It doesn't say so.

Mr. McKevitt: To me it is the entire operation.

Mr. Maury: We insist upon our objection; it doesn't refer to this property in any way.

Mr. McKevitt: Your Honor, it specifically describes the millsite, and specifically 55-three-room

dwelling, 40-four-room dwellings, 55-two-room duplex dwellings, 8 forty-two men bunk houses, which are the very things we are arguing about. Complete mining equipment. This is the surplus of this plant.

Mr. Maury: I don't think so. I think that is down at the mill.

The Court: That is on the lease?

Mr. McKevitt: Yes.

Mr. Lamb: Your Honor, it has an identifying number and if they insist upon it, we can tie that one in to show this is the identical property considered.

The Court: Is that all your exhibits at the present at any rate? [212]

Mr. McKevitt: This is another Executive Order that set up the War Assets.

Mr. Maury: This is an Executive Order that we know all about.

The Court: Of course, counsel for the defense claim on their part that this has some application to the lease or material bearing on the issues involved here. That is their claim. You object to it and say they haven't, except in respect to those exhibits you have already admitted that you have no objection to, so that without stopping now to go all through those exhibits, we will receive them subject to your objection.

Mr. Maury: Subject to our general objection to No. 7.

The Court: And then when you have more leisure after the case is over and preparing your briefs or statement of facts, we will consider them.

Mr. McKevitt: That is what I had in mind. These are my basis——

Mr. Maury: I always felt we couldn't agree to that but it is the best way to do it.

The Court: It is the best way to do it at this time because the Court isn't familiar with all these questions at this time and having gone through the complaint and answer and lease to make a definite ruling, and I, of course, don't propose to do it so we will let the matter stand that way and you [213] can proceed.

Mr. Maury: Of course, we have an exception or we take exception to each one.

The Court: Yes.

Mr. McKevitt: We have one more. I don't have a certified copy and the man who is in charge is here.

Mr. Maury: Let's see it.

Mr. McKevitt: This is a letter from War Assets Administration taking over responsibility of property from Reconstruction Finance Corporation as of September 1. Defendant's Exhibit No. 22.

Mr. Maury: This is objected to for the reason that under the law of Montana anyone acting in collusion with a tenant does not relieve the tenant from obligations under the lease. This instrument on its face shows that it was a perfectly voluntary instrument by the Reconstruction Finance Corpora-

tion and the War Assets Administration. It is the date of 27th day of August, 1946, or six months almost after Mouat was entitled to his, the Mouats were entitled to their property, and also that Reconstruction Finance Corporation had no power to dispose of any of this property. It was the property of the plaintiffs on the 1st day of March, five months and 29 days before the execution of this instrument.

Mr McKevitt: Your Honor, I am introducing that instrument to show a fact what the official records show; [214] that War Assets took over this particular piece of property from Reconstruction Finance Corporation. I think most of the objections Mr. Maury makes go perhaps to basic legal objections to the whole thing but that instrument is for that one purpose.

The Court: I will make the same ruling.

Mr. Maury: We except, your Honor.

Whereupon said Defendant's Exhibit No. 22, being letter dated Helena, Montana, August 31, 1946, from War Assets Administration, by Eugene H. Mahoney, Chief, Sub-Office, Real Property Disposal, to Reconstruction Finance Corporation, Helena, Montana, and attached Memorandum of Understanding dated August 27, 1946, offered and received in evidence, is a part of this record, and is in words and figures as follows, to-wit: [215]

DEFENDANT'S EXHIBIT NO. 22

War Assets Administration

Helena, Montana

August 31, 1946.

Reconstruction Finance Corporation

Helena Loan Agency

Power Block

Helena, Montana

Gentlemen:

The United States of America, acting by and through the War Assets Administrator hereby accepts the custody, protection and maintenance of Plancor 587, Columbus, Montana, as of the close of business this day.

Responsibility is hereby accepted for all real and personal property located on or belonging to Plancor 587.

Accountability for the property on Plancor 587 is conditionally accepted subject to reinventory by the War Assets Administration as set forth in paragraph two of Memorandum of Understanding by and between the Reconstruction Finance Corporation-Office of Defense Plants and the War Assets Administration dated August 27, 1946, a copy of which is attached hereto and made a part hereof.

UNITED STATES OF
AMERICA

By WAR ASSETS

ADMINISTRATOR

By /s/ EUGENE H. MAHONEY

Chief, Sub-Office, Real

Property Disposal. [216]

Defendant's Exhibit No. 22—(Continued)

Memorandum Of Understanding

This Memorandum of Understanding, entered into this 27th day of August, 1946, by and between the Reconstruction Finance Corporation-Office of Defense Plants and the War Assets Administration shall govern the procedure to be followed in transferring Plancor 587 and Plancor 133 to the War Assets Administration and define the duties, responsibility and accountability of each of the aforementioned, corporation, office and administration as hereinafter set forth in detail.

I. The War Assets Administration will assume responsibility and accountability for the protection, maintenance and plant clearance of Plancor 587 and Plancor 133 as of the close of business August 31, 1946.

II. The War Assets Administration will accept, in lieu of SPB 1's, the Asset Property Records and inventories for all property not previously declared on SPB-1 on Plancor 587 and Plancor 133. It is recognized that these records are not complete or in perfect condition due to the shortness of time for delivery to War Assets Administration. Accountability will be accepted on the basis of a reinventory by War Assets Administration personnel. Should any discrepancy arise between the Asset Property Records and inventories and the physical inventory as made by War Assets Administration, the Reconstruction Finance Corpora-

Defendant's Exhibit No. 22—(Continued)

tion-Office of Defense Plants agree to correct the Asset Property Records and inventories to conform with the [217] inventory as made by War Assets Administration.

III. The Reconstruction Finance Corporation-Office of Defense Plants will provide War Assets Administration with the original, certified or photostatic copies of all leases, deeds, abstracts, agreements, easements, rights of way, condemnation proceedings or any other legal encumbrance on or pertaining to Plancor 587 and Plancor 133. It is further agreed that copies of all available blueprints, plats and maps pertaining to the aforementioned Plancors will be furnished War Assets Administration.

IV. The Reconstruction Finance Corporation-Office of Defense Plants will assign to War Assets Administration, all leases, contracts and agreements affecting the continued operations on Plancor 587 and Plancor 133.

V. The War Assets Administration will employ such personnel not required by Reconstruction Finance Corporation-Office of Defense Plants and necessary to the continued operation of said Plancors.

In the event that clearance of funds is not received from the Washington, D.C. office of War Assets Administration, in sufficient time to meet the first payroll after takeover, the Reconstruction Finance Corporation-Office of Defense Plants will pay same upon receipt of proper authorization from

Defendant's Exhibit No. 22—(Continued)
the War Assets Administration, Helena, Montana,
Regional Office.

VI. It is further agreed that Reconstruction Finance [218] Corporation-Office of Defense Plants will request their Washington, D.C. office to transfer all automobiles, except one, now used on Plancor 587 and Plancor 133 to the War Assets Administration.

VII. The War Assets Administration will lease the office space used by Reconstruction Finance Corporation-Office of Defense Plants in Columbus, Montana and furnish Office of Defense Plants sufficient space and office equipment to terminate their operations.

The War Assets Administration will be reimbursed by Reconstruction Finance Corporation-Office of Defense Plants for office space and utilities on a pro rata basis to be later agreed upon.

RECONSTRUCTION
FINANCE CORPORATION

By
Title

OFFICE OF
DEFENSE PLANTS

By
Title

WAR ASSETS
ADMINISTRATION

By
Title

Mr. McKevitt: We offer this map. Defendant's Exhibit No. 23.

The Court: The lines are not very distinct.

Mr. Maury: Ours is an exact replica of it except the property is outlined in colors. It is an exact replica of the map we have got.

Mr. McKevitt: We can use the same map, but there is just one thing this map shows, your Honor, the other map doesn't, and that is the location of the area in the condemnation suit with respect to the rest of the property. In other words, their map is the same as this but down here around the mill-site that line is in the condemnation suit.

Mr. Lamb: For the purposes of the record we will mark the line to which Mr. McKevitt just referred with an "X", and it contains the words adjacent thereto of "Condemned Area".

Mr. McKevitt: I offer that map as Defendant's Exhibit No. 23.

Mr. Maury: We have no objection except it is a replica of ours.

The Court: Very well, it may be received.

(Whereupon said Defendant's Exhibit No. 23, being a map, offered and received in evidence, is a part of this record.) [220]

Mr. McKevitt: I think that covers our documentary evidence, your Honor. Call Mr. Norton.

JOHN EDWARD NORTON

was called as a witness for defendant, and having been first duly sworn, testified as follows:

(Testimony of John Edward Norton.)

Direct Examination

By Mr. McKevitt:

Q. Your name, please.

A. John Edward Norton.

Q. Where do you live, Mr. Norton?

A. New York City.

Q. For whom do you work now?

A. Anaconda Copper Mining Company.

Q. What school are you a graduate of?

A. School of Mines of the University of Montana, and School of Mines of Columbia University, New York.

Mr. Maury: Mr. Norton's qualifications as a Mining Engineer, Civil Engineer, and Metallurgical Engineer are admitted.

Q. (By Mr. McKevitt): Mr. Norton, for whom were you working in the year 1941?

A. For the Reconstruction Finance Corporation.

Q. Were you at any time employed by the Metals Reserve?

A. At that time I was doing work for both Reconstruction [221] Finance Corporation and Metals Reserve; later on I went entirely to Metals Reserve.

Q. In December of 1941 whom were you working for primarily?

A. Reconstruction Finance Corporation.

Q. Doing Metals Reserve work too?

A. Doing Metals Reserve work.

Q. As part of your duties in your capacity for

(Testimony of John Edward Norton.)

Reconstruction Finance Corporation and Metals Reserve did you proceed to Billings, Montana, to negotiate a lease for construction of mining property? A. Yes, I did.

Q. With whom did you negotiate?

Mr. Maury: We object. It is not material. The lease was finally negotiated and finally admitted to be the genuine lease and any prior negotiation is not relevant in this case.

Mr. McKevitt: Your Honor, I suppose I might as well explain now, in other words, in this lease as finally drawn there is certain language which or would have the necessity for quit claiming certain land for townsite, and another clause which refers to what should be left on the premises on termination of the lease, and it becomes very important, and the two are somewhat ambiguous to express what the parties that entered into the lease what those terms meant to them. [222]

The Court: That is altering the terms of a written agreement, isn't it?

Mr. McKevitt: Your Honor, I believe that the rule—well, it is not altering terms of the written instrument. It is not my intention to alter the instrument. We have here a lease admitted and part of the complaint in which as pertinent factors develop in this lawsuit are two of those clauses upon which a lot of the controversy has developed here. In other words, whether or not under this clause which states that wooden buildings and

(Testimony of John Edward Norton.)

wooden mine structures shall be left on the premises it was the intention that the parties at the time had a very definite meaning for wooden buildings and structures, and not to vary the terms but what was intended at the time the lease was terminated is the very crux of the matter now. I believe I could argue it on the terms of the lease as well but in view of the fact there may be latent ambiguity—I believe Tiffany in writing on the very rule we are discussing says it is a rule of great value to see that they were so charged that people once they write it cannot change it, but the contention of the defense here is not to explain when there is ambiguity that becomes of importance.

The Court: There can be no ambiguity of a wooden building. No man can testify something that is a wooden building is meant not to be a wooden building, any more than [223] a man can say a rocking chair is not a rocking chair.

Mr. McKevitt: I submit, your Honor, the term wooden buildings is so broad it covers everything. In particular terms you need some evidence to know what the people were thinking about, particularly where it was contemplating a lot of buildings, wooden buildings, entire mine and mill facilities, and the type buildings ordinarily around a mine, but in addition the parties knew there were town-sites to be built in different places, and it is very important, therefore, for this Court, I believe, to

(Testimony of John Edward Norton.)

get an idea what the parties at the time knew about that term wooden buildings.

The Court: Then you mean how many wooden buildings. You limit that term by saying so many wooden buildings some place.

Mr. McKevitt: Your Honor, distinguishing wooden buildings around the mine and the wooden buildings the men used here down at the townsite. That is really one of the disputes in this case. It is our contention wooden buildings is meant wooden buildings at the mine, and the townsite was to be built elsewhere, and does not include wooden buildings in this lease. In other words, we would just be arguing it back and forth on the bare statement of the lease and it leaves you all up in the air on the broad term of a wooden building complete. [224]

Mr. Shone: We have certain rules of construction by our statute that the terms of this lease will be construed and given the general meaning intended. Now counsel is attempting to restrict the terms of this lease to vary the lease by oral testimony and counsel in this case has not pleaded in their defense any mistake or ambiguity of the written instrument, nor have they ever attacked the validity of the lease in question; in fact, to the contrary, they have admitted this lease as being the contract. Now as I view it the Court will follow the Montana statutes in the construction to be given the words used in this lease, and not what some particular witness might state the terms should

(Testimony of John Edward Norton.)

be or that the terms should be less than the terms used, or that wooden buildings did not mean certain buildings. The Court will I think not elect at this time to restrict those meanings but will give to those terms the application they deserve.

The Court: What do the pleadings say about it? Is there ambiguity?

Mr. McKevitt: There is no pleadings on it. They don't plead mistake. They don't plead ambiguity or ambiguity of the lease in any way. The lease we admit as written is attached to the complaint, a copy of it.

I am not saying there is mistake. It is not a matter of pleading. I am not saying this instrument was mistake. It was the way certain men drew it. It is [225] the way they wanted it drawn. It is an important question of the historical developments. I am not varying and I am not changing it. I am simply explaining at this point what is important ambiguity at this point.

Mr. Lamb: If the Court please, we are dealing here with mining operations and the term wooden building used in the customary mining lease, the usual type of lease operated, and the contention of the Government is the wooden structures ordinarily found in a mining operation. However, in this particular matter we are also involved with a city, a townsite which was constructed, and those facts were known. And the purpose of this particular type of testimony is to show that that section was

(Testimony of John Edward Norton.)

understood by the parties when they specified in the lease that they would be given deeds for town-sites and millsites, and it was understood at the time that the words "wooden buildings" was put in there that they only meant the ordinary common wooden structures that are found at the usual mine operations.

The Court: Why didn't they put it in the lease while they were about it?

Mr. Maury: They did, your Honor. They put it in here just what you said, all wooden mine structures and wooden buildings erected should remain on the property intact. They used both terms, took in both wooden mine structures and wooden buildings. [226]

Mr. Lamb: As the Court knows, up around the usual mine sites it is found we have, or there are always a few miner's shacks and ordinary buildings, but at no time in this country have we ever found a city constructed up on top of a mountain for the specific purpose of permitting operations at a mine, and if the Court will refer to the exhibit that is there, it will show the mine structures and wooden buildings are located at the mine site and not at the townsite.

Mr. Shone: Now, may it please the Court, I want to read the latter part of paragraph 15 of the lease to show the Court what they could take off and what they should leave:

(Testimony of John Edward Norton.)

“Upon the expiration of this Lease or the termination of this Lease for any reason by either party, Lessee shall have six (6) months additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways,

Mr. Shone: That is the limit.

“but shall leave intact all mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings erected upon the demised premises and ore on dumps upon which royalties have not been paid.”

Mr. Shone: Now as the Court will notice in the construction of this lease that here the lessee who drew the [227] contract has stated what it shall take off and it does not include in it that it shall remove wooden buildings or wooden structures. It merely says:

“its personal property and its tools, equipment, machinery, tracks and tramways,”

Mr. Shone: And specifically says what shall remain on the property:

“wooden mine structures, wooden tramway towers and wooden buildings”

Mr. Shone: Now they attempt to restrict the terms of this lease by alleging wooden buildings erected upon the demised or leased premises did not include certain types of buildings. They at-

(Testimony of John Edward Norton.)

tempt to vary the terms of the written lease by oral testimony which we claim cannot be done.

Mr. Lamb: We are not varying the terms.

Mr. Shone: Varying or restricting the terms.

The Court: Well I suppose we might continue this dispute indefinitely. I will permit counsel to show what they intend to prove here and then whether it will be accepted and considered is another question, but we will see whether there is any justification for what they propose to do and the only way we can find out is to let them go ahead and state what they propose to do.

Mr. Maury: And we note our exception. [228]

The Court: Then we can see whether they can justify it or not later on.

Mr. Maury: You note our exception?

The Court: Certainly.

Direct Examination—(Continued)

By Mr. McKevitt:

Q. I believe you said that in December, 1941, you proceeded to the area of Billings, Montana, and negotiated for a lease? A. Yes.

Q. With whom did you conduct those negotiations? A. Mr. William Mouat, Bill Mouat.

Q. That is the plaintiff in this case?

A. Yes.

Q. Did you have any negotiations with Mrs. Mouat?

A. Yes, Mrs Mouat took part.

Q. At the time you were negotiating with re-

(Testimony of John Edward Norton.)

spect to the lease was there any discussion of the meaning of the language in paragraph 15, which is as follows, and I am now reading from the lease which is an exhibit to this case? [229]

“Upon the expiration of this Lease or the termination of this Lease for any reason by either party, Lessee shall have six (6) months additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings erected upon the demised premises and ore on dumps upon which royalties have not been paid.”

Mr. Maury: Well, same objection.

The Court: Same ruling.

Mr. Maury: We will except.

A. Yes, there was a discussion about that.

Q. Was the discussion about what the meaning of wooden buildings would be?

A. Yes, that whole paragraph was carefully discussed. I came out here the first time, the date you said, in June, 1941, for the purpose of getting the lease from Bill Mouat. Of course, at that time we discussed it and Bill agreed to give a lease.

Mr. Shone: To which we object of any discussions of a lease in June of 1941. Now we are dealing with a lease [230] of December 20th, 1941.

Mr. Maury: That is another lease entirely.

(Testimony of John Edward Norton.)

Mr. McKevitt: I think if you let the witness proceed——

The Court: I suppose this is preliminary to this present lease now under consideration?

Mr. McKevitt: That is right.

The Court: Go ahead.

A. Bill agreed to a lease similar to the one that the other chrome property——

Mr. Maury: We object to that lease unless it is introduced, unless it is right here.

The Court: I suppose he agreed he would execute a lease similar to this present lease.

A. (Witness): Well, there were no maps of these mining claims available that you could tell just where they were or what they were and I went over the property with Bill Mouat. I was here for a period I guess all-told of seven or eight days, and there were no maps to the property that I could definitely say what mining claims we wanted or what, so an abstractor was hired and he went to the courthouse——

Mr. Maury: We object as this is not material to this issue. He is rambling off. What the abstractor was hired for.

The Court: What are you coming to in all your preliminary steps? [231]

Mr. McKevitt: Would you get to it?

A. (Witness): All right. We discussed this proposition and we did it referring to the proposition of the construction work right at the mine-

(Testimony of John Edward Norton.)

sites, and that there would have to be townsites built, and there were townsites being built at the other property, and there were townsites to be built at this property and that is the reason we wanted 200 acres of land deeded to us because the Government wanted title to all of the land on which they put the townsites and millsites.

Q. (By Mr. McKevitt): Did you have any particular discussion in connection with what land would be for townsites?

The Court: Well I expect the witness knows now about what is expected of him after this discussion. Mr. Norton, do you?

Q. (By Mr. McKevitt): Did you have any particular discussion with respect to the meaning of the term wooden buildings as set out in the lease?

A. In paragraph 15 we had discussions, quite a few of them that that paragraph meant structures erected at the mine sites. By mine sites we meant sites where you went in the ore body and opened up to develop the ore body.

Q. In other words, was there anything in that discussion which would indicate that that term wooden buildings would [232] mean houses to be built at the townsite?

Mr. Maury: We object; that is not material. Was there anything indicated that it would not be might be material.

A. (Witness): That paragraph is all written on our discussion of the erection of what was needed

(Testimony of John Edward Norton.)

at the mine sites, the tram sites or shaft sites, whatever we would need to open up and mine that ore.

Q. And at the same time this other provision was put in the lease for creating fee land for construction of the mill sites and town sites?

A. Mill sites and townsites there was a paragraph there the Mouat people would deed 200 acres of land.

Q. Mr. Norton, are you generally acquainted with the production of chrome ore in the United States today?

A. Well I would say generally we are not a very big producer of chrome.

Q. Do you know of your own knowledge where the production of chrome comes from in the world today?

Mr. Maury: We object as it is not material to this issue. We will be a long ways from home.

The Court: I suppose he is leading up to execution for terminating the lease.

Mr. McKevitt: This is a different point, Your Honor.

The Court: All right, what is it?

Mr. McKevitt: I simply want to bring out the [233] commercial value of this mine.

Mr. Maury: Whatever the value is we are entitled to it.

Mr. McKevitt: It is important, Your Honor. On one of the issues, for instance, they are demanding a certain amount of money for lack of possession,

(Testimony of John Edward Norton.)

and I simply want the court to know whether this is a mine where possession would be of tremendous importance or whether it wouldn't.

The Court: Go ahead and develop your theory along that line.

Q. (By Mr. McKevitt): Do you know whether there is any chrome production commercially in this country today?

A. Oh, there is very little if any production in this country today. Very little.

Q. And what is the reason?

A. Well we don't have the chrome ore bodies that meet the specifications of the buyers.

Q. You mean by specifications the amount of percentage of chrome?

A. Yes, there are different specifications for the high grade chrome. The steel people have specifications. The chemical users have specifications, and so do the refractory users of chrome.

Q. Do you know what the percentage of chrome produced [234] from this mine was?

A. Well the concentrate that was produced from this mine ran 40, 41 per cent chrome and its chrome iron ratio, the ratio of chrome iron was very low. The concentrate out here ran about 1.6 to 1 and for metallurgical chrome the users practically demand $2\frac{1}{2}$ to 1 or better.

Q. By concentrates you mean the material produced after running through the mill?

A. After running through the mill.

(Testimony of John Edward Norton.)

Mr. McKevitt: That is all.

Cross-Examination

By Mr. Maury:

Q. Mr. Norton, were you present when this lease was being drawn? A. Yes, I was.

Q. Was Mouat present? A. Yes.

Q. Who was drawing the lease?

A. Oh, there was Mr. Mouat and there was Mr.

A. S. Hutchinson of Washington, D. C.

Q. Is he here now?

A. Yes, he is here. [235]

Q. Yes.

A. And there was Fred Gaethke was there for a while, and Judge Dwyer was there.

Q. Judge John V. Dwyer of Butte?

A. Judge John V. Dwyer.

Q. Where was that?

A. Why we worked in the Grand Hotel.

Q. And one night?

A. And we worked a night in the office over here at the Montana Power Company.

Q. Yes, sir. How long was it in process of being written and talked over and considered?

A. Oh, I couldn't say exactly, three or four days.

Q. And during that time there were consultations with Mr. Mouat?

A. Yes, and Mr. Mouat held consultations with his lawyers, the Honorable Judge Goddard and Henry L. Myers here.

Q. Yes.

(Testimony of John Edward Norton.)

A. And this other witness' father who was here today.

Q. Mr. Link? A. Mr. Link.

Q. Yes. You have never been admitted to the Bar? You weren't drawing the lease?

A. No, no, I wasn't.

Q. The lease in its final form was drawn by Mr. Hutchinson [236] and Judge John V. Dwyer, wasn't it?

A. No, I would say Mr. Hutchinson, and Mr. Mouat was there, and Mr. Dwyer sat in mostly as he took very little if any part in the drawing; he was present.

Q. Yes. Who dictated the lease?

A. Why it was all written up together. It was not dictated. You mean by dictating to a stenographer?

Q. The final form?

A. It was pretty well written out in longhand and then given to the stenographer, and Mr. Hutchinson did the greater part of the work.

Q. Yes, and now tell us just what conversation took place about paragraph 15, and who said what?

A. Well, paragraph 15 when we talked about it we said that that pertained entirely to the structures at the different points of the developing of the ore bodies.

Q. And you told that in the presence of Judge Dwyer and Mr. Hutchinson? A. Yes.

Q. Yes, and before the lease was drawn or before it was finally signed?

(Testimony of John Edward Norton.)

A. Oh, yes. Yes, it was. That was in, the same paragraph was in the original lease.

Q. The original lease was drawn in June of 1941?

A. Yes, June of 1941. [237]

Q. And do you know where that is?

A. No, I don't know where it is. Mouat had his copy of it and it was drawn to his terms. He had seen the lease of the Benbow people and he asked for a similar lease, and we did the best in our power to give him a similar lease to the Benbow.

Q. Now on the day or two or three days that the lease was being drawn and one evening when it was assuming final form who was present and where were you all?

A. We were in the Grand Hotel for several days.

Q. Yes.

A. And Mr. Hutchinson was present. There was a Government lawyer named Moses that was out here, and there was Judge Dwyer, and I believe a man named Buck that was a friend of Mr. Mouat's, I believe he was there most of the time, and Fred Gaethke of the Anaconda Copper Mining Company. That is about all I remember.

Q. And that was while the draft was being made?

A. Yes.

Q. And you were discussing things with the lawyers and they were asking you questions?

A. Yes, I was there to give the engineering advice on the——

(Testimony of John Edward Norton.)

Q. Now was that everyone who was there except Mr. Link?

A. As far as I remember that is everyone that was there. [238]

Q. You can't recall any person else that was there during all of that discussion unless it were some stenographer and typist?

A. Well the final night there was a stenographer but I don't remember anybody else being there. It has slipped my mind if there was anybody else there.

Q. And now can you tell us when the lease happened to be written that there should be wooden mine structures and also wooden buildings did the two mean the same thing to your mind?

A. No, they didn't. Wooden mine structures meant ore dams and trestles and tramways——

Q. And loading platforms?

A. Loading platforms, and wooden buildings meant the buildings that would house hoisting engines, any dries, machine shops or things like that.

Q. Now can you tell us why in one place they use the words wooden mine structures and in the other they just use the words "wooden buildings"?

A. Well the structures referred to the trestles, loading platforms and things of that kind.

Q. But I am asking you why the word "mine" was left out in one phrase and the word "mine" was put in wooden mine structures? Can you tell us why that was done?

A. All we thought on was how to show it all re-

(Testimony of John Edward Norton.)

ferred to the same thing because we contemplated all the time to [239] build the townsites on the land that was deeded by Mr. Mouat to the Government.

Q. Now deeded, that land was not in the lease but down close to the mill, was it not?

A. That was one site down close to the mill. There was a millsite and there would be a mill townsite, and we all knew that there would have to be a townsite up near the mine.

Q. I see. And yet in spite of all of that knowledge at that time the lease came out in its present form?

A. Yes, it was our idea that this 200 acres of land was deeded and that that would not be on any land covered by the lease, and that this paragraph here that Mr. Mouat would get all the buildings, wooden buildings and structures erected around the mine entrances.

Q. Now just what exactly did you tell Mrs. May Paula Mouat?

A. Oh, Mrs. May Paula Mouat I don't remember that we told her very much.

Mr. Maury: That is all.

Mr. McKevitt: That is all.

Mr. McKevitt: Just one more question, Mr. Norton.

Redirect Examination

By Mr. McKevitt: [240]

Q. Can you say of your own knowledge whether this mine has any commercial possibilities today?

A. Oh, it would be my opinion and only my opin-

(Testimony of John Edward Norton.)

ion that right at the present time that the mine could not be operated at a profit.

Q. And that situation has continued since the end of the war? A. Yes, I think so.

Mr. McKevitt: That is all.

Mr. Maury: That is all.

HUGH G. NICELY

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lennon:

Q. State your full name.

A. Hugh G. Nicely.

Q. Where do you live?

A. At the moment I am living at the Mouat mill-site camp.

Q. By whom are you employed?

A. War Assets Administration.

Q. In what capacity?

A. Facilities Supervisor. [241]

Q. And what is your training, professional training?

A. Graduate from the School of Mines, Montana, in 1935.

Q. And have you practiced your profession since that time? A. More or less.

Q. And when did you first come on to the Mouat mine property? A. April, 1942.

(Testimony of Hugh G. Nicely.)

Q. And you were in the employ of whom?

A. Anaconda Copper Mining Company.

Q. And at one time you were employed in the construction or mining operations?

A. That is right.

Q. And when was that?

A. When I went over there in 1942. That is when I was there as mine foreman.

Q. And did you continue your employment at that mine up to the present time?

A. That is right but not under Anaconda Copper Mining Company.

Q. When did you first go in the employ of the copper company?

A. January, 1944, Reconstruction Finance Corporation.

Q. And you continued in the employ of them up until War Assets took over? [242]

A. September 1, 1946.

Q. And you and your family live up at the mine at the townsite at the present time?

A. Correct.

Q. I am referring to the Plaintiff's Exhibit 2, the map, and call your attention to the houses indicated by numbers 1 through 12, inclusive, on the east side of the townsite; are you familiar with the present condition of those houses? A. Yes.

Q. And will you state what the condition of those are generally with reference to the condition of other houses in the whole area?

(Testimony of Hugh G. Nicely.)

A. The wallboard has been taken out and some of the electrical fixtures have been disconnected and the plumbing has been removed.

Q. Would it be a correct statement to say those houses are stripped entirely except for walls, ceiling and roof? Is that a pretty fair statement?

A. That is right.

Q. Is the plumbing and the plumbing pipe, electric fixtures and electric wires, and inside panels removed? A. That is right.

Q. Now with reference to the houses that were formerly located at places marked 13, 14, 15 and then 19 through 34 on this same map, I think it is Exhibit 2, those houses were [243] those houses removed from their piers? A. Yes.

Q. When was it with relation to the date of August 31st, 1946, before or after?

A. Shortly before; during the last week of August.

Q. When was the removal of those houses started with reference to August, 1946, before or after?

A. Before.

Q. And when were they completed?

A. I don't remember when it was. It was a month later at least that the work was stopped.

Q. How many had they taken off prior to August 1st, 1946? A. One.

Q. And the balance of the 21 were removed after that date I presume? A. That is right.

Q. And what was the type of house as compared to the type still remaining, standing? Will you

(Testimony of Hugh G. Nicely.)

point out one still remaining standing similar to the ones removed?

A. Right across the street here.

Q. Well call it by number. I will point to, for instance, house No. 22, that was removed, right?

A. That is right.

Q. Now will you give me the number of another house that has remained intact on the site at the present time? [244]

A. Here is one right here.

Q. Well, one that hasn't been stripped up in the west part; I believe anyone of these 49 through 50?

A. 50 E.

Q. Now are you familiar with the present condition of the houses that remain standing?

A. Fairly well.

Q. Excluding the 11 that I have already referred to, will you state—can you state whether or not anything other than fixtures, plumbing fixtures and electrical fixtures have been removed?

A. That is all. To my knowledge that is all that has been removed.

Q. You are testifying from your own knowledge?

A. That is right.

Q. You are there every day and have occasion from time to time to see these houses, correct?

A. That is right.

Q. So the houses other than the 11 that still remain on there you will state that the plumbing fixtures have been removed? Is that right?

(Testimony of Hugh G. Nicely.)

A. Have been removed.

Q. And do you know whether or not at any time there were any oil heating units in any of the dwelling houses in the area? [245]

A. Each house was furnished with an oil heater.

Q. Oil heater? A. Kitchen range.

Q. Now was it an oil heater or was it a cook stove? A. Primarily cook stove.

Q. What do you mean primarily?

A. It was used for both purposes.

Q. Well if it was out in the store and you went to buy it, what would you ask for?

A. Cook stove.

Q. And it was connected I presume to the tank outside?

A. That is right, with copper pipe.

Q. Going through the wall?

A. That is right.

Q. And it was a cook stove which was used for cooking the food and heating the house, is that right? A. Yes.

Q. And all of those were removed, is that correct? A. Correct.

Q. Was any of the—I am not referring to plumbing fixtures—but was any of the pipe plumbing itself or electric wiring removed from any of the houses other than those removed in the 11 I talked about before?

A. You say pipes and electric wire?

Q. Was any of that removed? [246]

(Testimony of Hugh G. Nicely.)

A. Not deliberately by men who worked for the Government.

Q. Did the Government remove any?

A. Definitely not.

Q. Would your answer be the same with reference to the mess hall? A. Right.

Q. And to the 4 forty-two man houses.

A. Right.

Q. And to the store? A. That is right.

Q. Now going up to house No. 35, is that the first-aid house? A. That is right.

Q. House No. 35 is what is known as the first-aid house? A. That is right.

Q. What is the condition that house is in now with reference to the other houses remaining standing?

A. The plumbing and some of the interior sections has been stripped out of it.

Q. So house 35 would be in the category of the 11 houses away over on the east side? Is that a correct statement? A. Correct.

Q. When with relation to August 31st, 1946, did the Government remove those plumbing fixtures?

A. Prior to that date. [247]

Q. How long ago? A. How long before?

Q. Yes.

A. We worked up shortly until the end of the month.

Q. Of that month, August, 1946? A. Yes.

Q. Did they remain up at the mine?

(Testimony of Hugh G. Nicely.)

A. Some were at the mine site and some stored in several of the other buildings off the lease.

Q. But they were not taken away from the mine prior to August 31, 1946? Is that correct?

A. No.

Q. Were you requested to make a list of the fixtures that had been removed from all the houses remaining standing in the leased area, you together with other employees?

A. That is right. Not as to each building but just general inventory as to the number.

Q. And then that list is made to exclude what was in the houses removed?

A. That is right.

Q. I show you what purports to be a list of townsite portion of Mouat lease of fixtures and quantities. Was that list made pursuant to your conference with other members of the Government in making a list of what was removed at my request as a matter of fact? [248]

A. Yes.

Q. And it is broken up into ten different categories showing the different types of houses from which the fixtures were removed, is that right?

A. Yes, that is right.

Q. And this is from your knowledge a list of everything that has been removed from the townsite area from the various dwellings and houses and the individual buildings, including the store, bunk houses and the mess hall?

A. That is right.

Mr. Maury: This purports to be only 10 of the houses.

(Testimony of Hugh G. Nicely.)

Q. (By Mr. Lennon): Will you explain how that list is broken up? What is the first item. There are 10 items. A. Three room, 25x24.

Q. The first item is with reference to what was removed from the three room houses?

A. That is right.

Q. And is this with reference to the 22 three room houses that were removed from the premises?

A. That is right.

Q. And is this toilets, lavatories, kitchen sinks, water tanks, showers and mirrors?

A. That is right. [249]

Q. Now is that all that was removed from the three room houses referring to the 22 that are removed? A. That is right.

Q. Let's proceed to the next item. The second item is with reference to the 11 houses on the east side, correct? A. Yes.

Q. And what was removed from each of those?

A. What was removed from each of those, toilets, lavatories, kitchen sinks, water tanks, showers, mirrors, 11 each.

Q. The third item refers to the four room houses that are still intact over further to the west of the houses removed, right? A. That is right.

Q. And there were how many of those houses?

A. 40.

Q. And will you tell the court the items that were removed from those 40 houses?

A. 40 each bathtubs, lavatories, toilets, kitchen sinks, medicine chests, water tanks.

(Testimony of Hugh G. Nicely.)

Q. Now the next item is the duplex houses?

A. Yes.

Q. And how many of those houses remaining standing? A. 40.

Q. And will you state what has been removed from those houses? [250]

A. 40 each toilets, lavatories, showers, medicine chests, water tanks, sinks, kitchen.

Q. Now the four bunk houses, Item No. 5, what does that indicate has been removed?

A. 16 toilets, 8 urinals, 32 lavatories, 8 laundry tubs, 102 radiators, 8 drinking fountains.

Q. And the mess hall?

A. Mess hall, 1 electric panel switch, toilet, lavatory, Cond. tank and electric heater.

Q. And Store building?

A. Store building, 2 lavatories, 2 toilets, and 4 steam heaters.

Q. And the first-aid house?

A. 2 lavatories, 1 bathtub, 1 medicine chest, 1 toilet, 1 kitchen sink, 4 cast iron radiators and water heater.

Q. All right, what was removed from the Post Office? A. Nothing.

Q. And the garage? A. Nothing.

Q. And that is the list of the items that have been removed from the entire townsite of the townsite? A. That is right.

Mr. Lennon: I don't think I need to offer it in evidence. [251]

(Testimony of Hugh G. Nicely.)

Q. (By Mr. Lennon): Mr. Nicely, there have been a considerable number of houses sold off that mine site, haven't there? A. Yes.

Q. And you are familiar with the general and dwelling structures and mine structures and the purposes which each one serves?

A. That is right.

Q. And are you familiar with the chromite mining? A. As it existed up there I am.

Q. Well you are a mining engineer?

A. That is right.

Q. Are you familiar with the type of chromite that was mined from the Mouat mine as compared to the type of chrome that was received from foreign sources? A. Yes.

Q. Will you state the difference between the two?

A. Well, fundamentally it is the amount of chrome in the ore, availability of the chrome and the ratio of the chrome to the iron is the difference. That is fundamentally the difference.

Q. Well would you say that the chrome that is imported is a better quality of chrome?

A. That is right.

Q. And can you say whether or not this mine has any [252] commercial value as a chromite mine at the present day having in mind the possibility now of importing chrome with better chrome content, better type and cheaper?

A. In my opinion it has no commercial value.

(Testimony of Hugh G. Nicely.)

Q. Now with reference to the accessibility to the townsite and the nickel mine of Mr. Mouat and his parties you heard the testimony this morning with reference to the two chains; was there a time when the Government did maintain two chains at two different parts of the road?

A. One chain is all I know of.

Q. Well you were there every day?

A. That is right. The chain Mr. Link mentioned was just an emergency.

Q. I don't mean that chain. Do you maintain a chain across the road at certain times during the day and lock it?

A. That is right. After hours.

Q. And what do you mean by after hours?

A. After four thirty.

Q. That chain was put up and left there from 4:30 until you opened up for business the next morning?

A. That is right.

Q. And would that chain be put up again over a week end when you are not working?

A. Any time there was nobody up around the mine site.

Q. And what was the purpose of that chain?

A. There would be people drive up to the mine site to visit people and when we had this chain out they would refrain or it would keep people from going up there.

Q. When were the guards removed from the Mouat mine?

(Testimony of Hugh G. Nicely.)

A. We haven't had any guards up there for four or five months.

Q. Will you explain please the old road as it existed prior to the construction of the Government's road?

A. You mean the main road up there?

Q. That is right, yes.

A. Well it took off right back of the mill site and wound up a little creek where we had warehouses, when first started, and from there up it was strictly a caterpillar road.

Q. And had you gone over that road prior to construction of the Government road?

A. Many times.

Q. Is there a way of entering the nickel mine—well, getting to the town site without passing the guards as they existed seven or eight months ago at the No. 1 entrance?

A. No, you couldn't get up there on that old road.

Q. You couldn't get up by automobile?

A. No.

Q. You could walk, of course?

A. You could walk, of course.

Q. Can you state whether or not the houses as they [254] remain up there now have any commercial value in place?

Mr. Maury: Objected to. He has not proven himself competent as a witness, not qualified.

The Court: I think that objection will be good.

(Testimony of Hugh G. Nicely.)

Mr. Lennon: That is all.

The Court: Court is adjourned until tomorrow morning at 10:00 o'clock. [255]

Court convened, pursuant to recess, at 10:00 a.m. on November 14, 1947, at which time parties and counsel were present.

The Court: Gentlemen, are you ready to proceed this morning?

Mr. Lamb: Yes, Your Honor.

Mr. Maury: Yes, Your Honor.

(Hugh G. Nicely resumed the stand and testified as follows.)

Cross-Examination

By Mr. Maury:

Q. Mr. Nicely, what is the Post Office to which mail is addressed by people living up at the Mouat property?

A. Most of the people get their mail at Nye.

Q. Nye? A. Nye.

Q. When did you first go to Nye to work—I mean—— A. The Mouat property?

Q. To the Mouat property?

A. I think it was April, 1942, on this job.

Q. You were working there for the Anaconda Copper Mining Company at that time?

A. That is right.

Q. How long did you continue to work for the Anaconda [256] Copper Mining Company?

A. Until January 1st, 1944.

(Testimony of Hugh G. Nicely.)

Q. And then for whom did you work?

A. Reconstruction Finance Corporation.

Q. And how long for that company?

A. Until the 1st of September last year, 1946.

Q. And at the Mouat plant? A. Yes, sir.

Q. Your duties for the Reconstruction Finance Corporation did not take you anywhere else?

A. No.

Q. Whereabouts did you and your family live?

A. In Columbus. My wife and daughter lived in Columbus.

Q. Where did you live?

A. At the Mouat Mill site.

Q. In what house? A. Guest house.

Q. Did you ever live up at the Mouat, the plateau up there where the lake is?

A. Mouat Lake Camp, yes, I did during the operation of the mine.

Q. During the operation of the mine and what house did you live in there?

A. On the map do you want to refer to it?

Q. Yes. [257]

A. House No. 36 on First Street West.

Q. Point it out, will you, which side of the line it is on? A. Right here.

Q. Right there? A. Yes.

Q. And how long have you occupied that house?

A. How long did I occupy it?

Q. Yes. A. Oh, roughly two years.

Q. When did you move out of it?

(Testimony of Hugh G. Nicely.)

A. I don't recall when it was.

Q. Was it after September 1st, 1946?

A. No, it was before that. It was roughly about the time the operation ceased.

Q. Now how many people were living up at that Camp at the Lake Placer or the Lake on September 1st, 1946?

A. Oh, I would say roughly a dozen.

Q. Had they all been employees?

A. Had been?

Q. Yes. A. Yes, they were employees.

Q. They were employees? A. Yes.

Q. One time of the Anaconda Copper Mining Company? [258]

A. Not necessarily.

Q. Yes, but they were employees connected with the mine? A. That is right.

Q. There was nobody living there except employees or except persons who might run the Post Office or store or school in connection with the mine, was there? A. That is right.

Q. In fact all of that property up there at the Lake Placer was one, was a part of one mining enterprise, was it not, Mr. Nicely? A. Correct.

Q. And there was nothing there that was not of use in running a large mining operation?

A. Right.

Q. Anything else there, anything of any other nature was voided? A. That is right.

Q. Mr. Nicely, how many persons were occupy-

(Testimony of Hugh G. Nicely.)

ing that land up there about the 1st of September, 1946, those buildings?

A. About 12 families.

Q. And about how many were there on the 1st of March, 1946? I mean occupying those houses up on the Lake Placer? A. I don't recall.

Q. I am just asking for an approximation? [259]

A. Well, say twelve.

Q. They were working people? I mean except the wives? A. Yes.

Q. The men that were there were working people? A. Yes, sir.

Q. And how many continued to occupy those buildings until the first of September approximately?

A. Oh, about the same number, I guess. I don't know. That might have been 12, might have been 15.

Q. And you were in charge?

A. That is right.

Q. Mr. Nicely, do you recall about the 1st of September a notice being placed at the gate of the lower camp in which Bill Mouat's—

A. First of September?

Q. Approximately 1st of September, 1946?

A. Yes, I believe I do.

Q. And what did that notice state?

A. Oh, I don't know the exact wording of it but it was to the effect Mr. Mouat would have to have a pass when he came in with any of his friends.

(Testimony of Hugh G. Nicely.)

Q. Now with the exception of the gate that property down there was heavily fenced?

A. There was a fence around the lower perimeter of the camp area. You are speaking of the mill? [260]

A. Yes, I am speaking of the mill and it was carefully and efficiently fenced?

A. That is right.

Q. And fences were all around or just to prevent access from the Stillwater road?

A. That was the object of the fence, yes.

Q. Through that gate was the only accessible road to the Lake Placer, wasn't it?

A. Yes, that is right.

Q. I mean accessible for vehicles?

A. Correct.

Q. And before you got to the Lake Placer—I am speaking of the period in August, 1946,—there was a gate or fence across the road?

A. Below the Lake Placer?

Q. Yes. A. Yes, there was.

Q. And can you point out on the map approximately where that gate was?

A. Roughly in here.

Q. Will you indicate the place by just writing the word "gate?" A. Yes.

Q. Was there a lock for that gate?

A. Yes, sir. [261]

Q. And was it locked at times?

(Testimony of Hugh G. Nicely.)

A. It was locked under hours. We were undermanned and didn't have the men.

Q. By under hours what would the hours be?

A. Well, we quit at 4:30.

Q. Who had the custody of that key?

A. Mr. Arthur Helseth.

Q. Mr. Arthur Helseth? A. Yes.

Q. Who was Mr. Helseth? Who employed Mr. Helseth?

A. He was shift boss under me at the mine, and then worked for Reconstruction Finance Corporation, and subsequently War Assets.

Q. He wasn't so far as you know employed by Mr. Mouat? A. No, sir.

Q. And that gate was locked at times all during the period from March 1st to September 1st, 1946, after hours? A. That is right.

Q. Mr. Nicely, was there another gate at the end of the road? A. Yes.

Q. Or chain across the road?

A. Yes, there was.

Q. And was that kept locked at times?

A. At times. [262]

Q. And what was the purpose of that chain with a lock?

A. Cars would drive up to the camp to visit people that lived up there and would be curious enough to go up to the upper camp and we had a chain with a red reflector to keep them out of there.

Q. Yes, some of the property in the lease was what you call the upper camp?

(Testimony of Hugh G. Nicely.)

A. The mine buildings.

Q. And the road wound through the camp there at Lake Placer and off to the right and then up to other properties in the lease?

A. That is right.

Q. You were well acquainted in a general way with the boundaries of the leased property?

A. That is right.

Q. You have a map showing it?

A. Yes, sir.

Q. Mr. Nicely, if Mouat or anyone under Mrs. Mouat on the 2nd of March, 1946, had attempted to remove any of the property on the Lake Placer, what would you have done, permitted it?

A. No. No, sir.

Q. And that supposing Mr. and Mrs. Mouat or Mrs. Mouat went there tomorrow and started removing property by themselves or by their servants, what would you do? [263]

Mr. Lennon: If the Court please, that is objected to on the ground that it is a general question. Removal of property; I think he should be more specific.

Mr. Maury: All right, I will be very specific.

Q. Suppose Mr. and Mrs. Mouat went there to the Lake Placer and property inside of the lease and started with the aid of servants moving one of those houses, what would you do?

Mr. Lennon: If the Court please, that is objected to for the reason it is beyond the realm of cross-

(Testimony of Hugh G. Nicely.)

examination and is no proof that they have tried to remove any of these premises.

The Court: Well, of course, it is beyond the direct examination. He can make this witness his own if he wants to and go into that matter.

Mr. Maury: All right, we will.

Q. (By Mr. Maury): What would you do?

A. You would have to prevent their removing any property.

Q. You would have to prevent it? A. Yes.

Q. And that condition has existed ever since the 28th day of August, 1946? A. Yes. [264]

Q. That had they attempted to remove any building or any plumbing or anything on the ground in the lease you would have prevented it?

A. With the proper authority I would have, yes.

Q. Now, with the proper authority you mean court authority?

A. No, I mean in form of document or sales document or whatever is required to get something.

Q. Without their getting authority, just on their own authority they couldn't remove anything from there while you were there? A. Correct.

Q. Mr. Nicely, are you a member of the Nye Wrecking Company?

A. Yes, sir, I am the business manager for it.

Q. Business manager for the Nye Wrecking Company? A. Yes, sir.

(Testimony of Hugh G. Nicely.)

Q. In fact that is a partnership consisting of Hugh G. Nicely and Art Helseth?

A. That is right.

Q. What is the business of the Nye Wrecking Company?

A. Well when machinery is being sold at the mill it is just difficult to get anybody to go up and take the machinery out so Mr. Helseth has a crew men there removing that machinery.

Q. Yes. A. That is right. [265]

Q. And at whose request?

Mr. Lennon: If the Court please——

Mr. Maury: We want to show the basis of this witness.

Mr. Lennon: I object to this question on this ground it has no bearing upon this lawsuit. The witness has testified with reference to some other portion of the mining site other than what is involved in this lawsuit. I cannot see any direct or indirect bearing on the issues involved here. I cannot see any connection whether this witness or somebody else is engaged in removing machinery from some other part of the mine.

The Court: It may be material. I will permit him to answer the question.

Mr. Maury: Read the question.

(Question read):

Q. And at whose request?

A. Persons purchasing machinery. Persons

(Testimony of Hugh G. Nicely.)

largely who have purchased the machinery in the mill.

Q. (By Mr. Maury): Mr. Nicely, have any houses been removed from the Lake Placer down the hill and intact as to frames?

A. From Lake Placer; not that I know of.

Q. None have been removed down intact?

A. None that I know of.

Q. How many are standing there now? I mean on the [266] leased ground. You are familiar with the boundaries of the leased ground?

A. You mean including the mine buildings or dwellings?

Q. I mean dwellings and store building if there is one, and school or anything?

A. Well it is the total whatever that was less 22.

Q. What? A. The total less 11, or 22.

Q. There have been 22 removed?

A. Yes, 22 removed.

Q. What was done with the houses that were removed?

A. Well they were demolished and the lumber was taken by the Reclamation Service for use in some of their projects.

Q. It was removed from the land?

A. From the Lake Placer.

Q. Now when did you commence taking the plumbing out of the buildings on the Lake Placer and on the leased land?

(Testimony of Hugh G. Nicely.)

A. It seems like it was around July, 1946.

Q. July? A. Yes.

Q. What part of July as near as you can remember unless you have written data on it?

A. I have but not here. I would say the first part of the month.

Q. Where is the written data? [267]

A. Up at the mill.

Q. Did counsel request you to bring the written data here? A. Did who?

Q. Any of the lawyers?

A. No, I just got my orders from Helena. Whether a lawyer or——

Q. And was there any request to bring all your written data as to that removal of the plumbing here to court? A. No.

Q. You were notified by someone that the trial would take place on a certain day?

A. I had a subpoena.

Q. You were subpoenaed? A. Yes.

Q. And by the defendants not by the plaintiff?

A. I don't know who it was.

Q. And was that subpoena—do you know what a subpoena duces tecum is or not?

A. Pardon.

Q. Did the subpoena command you to bring any data or books or memorandum or anything like that?

A. No, just told me to be down here ten o'clock Wednesday morning.

(Testimony of Hugh G. Nicely.)

Q. They never notified you, no one ever notified you to bring any data or any memorandum of what had been done there? [268]

A. I have no records up there.

Q. What are those records?

A. I imagine they are in the custody of War Assets at the moment at Columbus.

Q. In Columbus, that would be about forty miles from where this Court is being held, roughly?

A. Yes.

Q. How much of the plumbing, wiring, and other fixtures were removed from the leased property before the 1st of September, 1946, and after the 28th of February, 1946, I mean in that six months.

A. Well you have it all there in a document you submitted as evidence, the number of lavatories, toilets, bath tubs, and so forth.

Q. What I wish to know is was it all of the plumbing, all of the wiring and all of the fixtures insofar as they have been removed were they removed previous to August 28th, 1946?

A. That is right.

Q. Where were they put?

A. Well the biggest portion of them were stored in several buildings off of the Lake Placer in the school house and recreation room.

Q. And that was the biggest portion and where was the lesser portion stored? [269]

A. Oh, there was some of it in the 42-man bunk houses, some in the duplexes, some in three-room

(Testimony of Hugh G. Nicely.)

houses; wherever we could store it out of the weather.

Q. Were they on the leased premises or off?

A. Off.

Q. They were all stored off the leased premises?
A. That is right.

Q. In the upper camp and what we call the leased premises camp, that was connected with electric light and power?

A. It was all on the same system.

Q. There was one house moved previous to August 28th, 1946?
A. No partially demolished.

Q. Partially demolished?
A. Yes.

Q. Were there any others partially demolished before then?
A. No, sir.

Q. Now how many were all moved off after the 28th of August, 1946?
A. 22.

Q. 22 of them were?
A. Yes, sir.

Q. I mean all that were removed; there are some standing [270] there now?

A. In part they were demolished; they weren't moved wholly.

Mr. Maury: That is all.

Redirect Examination

By Mr. Lennon:

Q. Mr. Nicely, referring to the Plaintiff's Exhibit No. 23, representing a map, and particularly to the north portion thereof to the place where I am pointing even with the mine site?
A. Yes.

Q. Do the dwellings and buildings within that

(Testimony of Hugh G. Nicely.)

area, are they included within the Lake Placer claim? A. Yes, the first.

Q. And so again in Plaintiff's Exhibit 2 of the dwellings south of the line "M" "N" and west of the line "N" "O", they are within the what is known as Lake Placer claim?

A. Roughly. I didnt put that line on there. I could check upon it in a few minutes, but I guess it is.

Q. You can check. I don't want to guess.

A. Yes, that is right.

Q. Now, Mr. Nicely, with reference to the [271] plumbing fixtures that you referred to yesterday on direct examination, specifically the toilet, lavatory, kitchen sink, mirror, medicine chest, some were mirrors and others were medicine chests, will you explain the requirements, mechanical requirements for their removal?

A. Well generally you could reach the sinks in the kitchen and the sinks and the fixtures in the bathroom were back to back, you could generally reach both those through the same wall.

Q. And what would you do to remove them?

A. Disconnect pipe connections and in some cases take out a few pieces of moulding.

Q. And if you replaced them, you would go through the same motions in reverse, is that natural?

A. That is true.

Q. You stated for a portion of the time you were staying at what is called the guest house, where is

(Testimony of Hugh G. Nicely.)

that located, at the mill site? A. Mill site.

Q. Did you ever give any instructions to refuse Mr. Mouat or his guests or parties with him, did you ever give instructions to refuse him admittance?

A. No, sir.

Q. Do you recall at any time when he has come on to the mine either alone or with other people where they were [272] refused admittance?

A. Not to my knowledge. Not directly through me he had no trouble getting on that property.

Q. Well I am asking about what you know and you have stated what your connection with the mine was? A. Yes.

Q. Now Mr. Mouat never asked you for permission to remove a building, did he?

A. No, sir. .

Q. Did anybody in his behalf ever ask to remove a building that you recall? A. No, sir.

Q. And as a matter of fact at any time he wanted to remove any property of his own you permitted him to do it?

Mr. Maury: Just a minute. Any property of his own involves a legal conclusion of a very serious nature.

Mr. Lennon: I will withdraw it.

Q. Any time he wanted to withdraw property you didn't refuse it, did you? A. No.

The Court: He said he never wanted to withdraw it, never attempted to?

A. That is right.

(Testimony of Hugh G. Nicely.)

Q. (By Mr. Lennon): You were describing a fence, Mr. Nicely. Is that the [273] fence around the condemned area of the mill site?

A. No, it doesn't follow any particular boundary.

Q. But at the gate No. 1?

A. That is the lower gate at the mill.

Q. There is a fence around there and that is what is known as the, that is the condemned area?

A. Not necessarily it doesn't fence the condemned area; it fences the mill site.

Q. Where is the condemned area?

A. It is roughly outlined in red.

Q. Referring to Defendant's Exhibit No. 23 with a red line starting on northwest corner of the map and coming down to line No. 5000 and then going west to a point at the Stillwater river, correct?

A. Yes.

Q. And then south to a point between 49,000 and 48,000?

A. That is right.

Q. And then west in a direct line to a point west of—how would you describe that point?

A. Oh, I would say it was a couple hundred feet south of the Monte Alto tunnel.

Q. A couple hundred feet west of the Monte Alto tunnel, that is what is known as the condemned area, correct?

A. Correct.

Q. With reference to any property that has been removed [274] or to be removed do you get orders

(Testimony of Hugh G. Nicely.)

as to how you are or where you will allow it to be removed?

A. Yes, it has to be certified sales document of that piece of equipment.

Q. On direction of higher authority?

A. That is where it comes from.

Mr. Lennon: That is all.

Recross-Examination

By Mr. Maury:

Q. Mr. Nicely, you spoke of wallboards being pulled in the removal of plumbing?

A. I said you have to cut a small piece of wall-board out between the kitchen and the bathroom to get to these unions.

Q. And what is that wallboard made of?

A. I don't know. Some kind of pressed fibre of some sort.

Q. And is it wood? A. Could be paper.

Q. Now was it wood?

A. No, it is not wood.

Q. What is it, it is made out of wood?

A. It is a patented process made of wood pulp.

Q. Made of wood? A. Yes.

Q. The condemned area and the leased area are two entirely different tracts of land, are they?

A. Right.

Mr. Maury: That is all.

Mr. Lennon: That is all.

LEE H. ST. JOHN

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lennon:

Q. State your full name.

A. Lee H. St. John, Seattle, Washington.

Q. Mr. St. John, you are an employee of War Assets Administration? A. I am.

Q. With your office at Seattle, Washington?

A. That is right.

Q. And you have been how long?

A. Oh, for about fifteen months.

Q. And in what capacity are you employed by War Assets Administration? [276]

A. Chief of the Disposal Branch, Appraisal Division, Seattle Region.

Q. Appraisal Division, Seattle Region?

A. That is right.

Q. And does the Seattle Region include the state of Montana, and particularly this Mouat mine site?

A. It includes Washington, Idaho and Montana.

Q. And you are a registered professional engineer?

A. In the states of Colorado and Washington.

Q. And what is your training as to your profession?

A. I matriculated in I.C.S. in Scranton, Pennsylvania in 1917, and I have been studying engineer-

(Testimony of Lee H. St. John.)

ing ever since, and I am a graduate of the LaSalle University, Chicago, and so on and so forth.

Q. Well what is so on and so forth? I want to get your qualifications here.

A. You mean what?

Q. How long you say you have been an engineer?

A. I have been an engineer for thirty years.

Q. What engineering societies are you a member of?

A. The American Association for Engineers, American Institute of Mining, Metallurgical Engineers.

Q. And have you been in the employ of any architectural architects?

A. Hollybed and Root, Chicago. [277]

Q. And in what capacity?

A. Chief Utility Engineer.

Q. And were you in charge of any particular job in connection with that work?

A. Well at the time I was with them they had approximately six hundred million dollars of contracts, and among the jobs was——

Q. Name a couple of them.

A. The Hotel Statler, Washington, D.C., and Hotel Northern in Billings.

Q. How about—did you have anything to do with Sun Valley?

A. I was Consulting Engineer for five years.

(Testimony of Lee H. St. John.)

Q. And in what capacity Consulting Engineer five years? A. Consulting Engineer.

Q. What, the construction or maintenance of it, or what?

A. Well it was just on generalities, whenever they had something come up when they wanted to use my services.

Q. Now have you any training with relation to ceramic engineering?

A. Somewhat. I made a study of it for around thirty years.

Q. Are you familiar with chromite mining?

A. To some extent.

Q. Now what are your duties as Chief of the Appraisal [278] Division of the Seattle Region of the Industrial Branch?

A. To classify and evaluate all industrial properties, including war plants of various kinds, rendition plants, metallurgical plants, mines, mills.

Q. Including the Mouat mine?

A. Including the Mouat mine.

Q. And when you say classify what do you mean by that?

A. Well by classification we mean what it is, what classification it goes into so far as 05, 07—

Mr. Lennon: This Court does not understand that.

Mr. Maury: How do you know?

The Court: Maybe it won't be necessary.

Q. (By Mr. Lennon): What do you mean by

(Testimony of Lee H. St. John.)

classification, what is to be done with the property?

A. Our classification is for what is to be done with the property, that is, for future use and so on and so forth.

Q. And do you value industrial plants for the purpose of sale and disposal?

A. For sale and disposal.

Q. Now was there a time when you visited the Mouat mine in connection with your official duties with War Assets? A. Yes.

Q. When was that?

A. The first time I visited the Mouat mine site was on [279] April 5th, 1947.

Q. And did you visit it again?

A. No, I did not.

Q. That was the only time you did visit it?

A. That is right.

Q. And did you make an appraisal on the buildings on the leased area involved in this lawsuit?

A. Yes, I did.

Q. And you have it in writing, reduced it to writing?

A. Well part of it. That is, the portion of 79 buildings that was off the area that was under litigation.

Q. By that you mean you valued the buildings north of the line, north of line "M" and "N" on Plaintiff's Exhibit No. 2, is that correct?

A. That is right.

(Testimony of Lee H. St. John.)

Q. As well as buildings east of the line "N" "O"?

A. That is right.

Q. Now the buildings you have just referred to are the same similar type of building the other side of that line within the leased premises, is that correct?

A. Yes, I went over all the buildings; that is, the ones within the boundaries.

Q. Well then you reduced to writing the valuations placed upon buildings off the lease?

A. That is right. [280]

Q. But you inspected all the buildings?

A. I inspected all the buildings.

Q. And at that time when you inspected the buildings within the leased premises were the plumbing fixtures removed?

A. Within the leased area?

Q. Yes. A. Yes, they were removed.

Q. Now with reference to the 11 buildings known as buildings No. 1 through 6, and 9, 10, 11—strike that—buildings 1 through 7 and 9, 10, 11, 12, you saw those buildings and made a valuation of them?

A. That was 11 buildings there, wasn't it?

Q. Yes. A. Yes, I went through them.

Q. And are they the same type as any building off the leased area on the townsite?

A. Yes, they were the same as three-room homes practically we worked up an appraisal on.

Q. And what valuation did you put on those 11 buildings as they stood?

(Testimony of Lee H. St. John.)

A. On those 11 buildings as they stood?

Q. Strike that out, please. What valuation did you place upon, for instance, the building marked "E" on Plaintiff's Exhibit No. 2, the one closest to the line "N" "O"? A. But over the line?

Q. Yes. A. \$400.

Q. And that was the same type building as buildings 1 through 7 and 9 through 12?

A. That is right.

Q. And that was the valuation of that building?

A. Intact.

Q. Intact. All right, what was the difference between the value of the buildings intact and the 11 buildings I just referred to?

A. Oh, I would say about \$75.

Q. Now with reference to the 22 buildings that have been removed and particularly buildings No. 13, 14 and 15 and 19 through 35; you say those buildings had been removed at the time that you visited the site? A. That is 22 buildings?

Q. Yes, they had been removed?

A. That is right.

Q. And naturally you never saw those buildings because they were gone?

Mr. Maury: Objected to as argumentative.

Mr. Lennon: I withdraw it.

Q. Do you know the type building constructed on those particular piers where the 22 buildings were removed? A. Yes. [282]

(Testimony of Lee H. St. John.)

Q. And what type building was it by comparison with buildings off the leased area on the townsite?

A. Well, they were three-room buildings the same as——

Q. The 11? A. The 11.

Q. So they have the same valuation of \$400 intact? A. That is right.

Mr. Shone: \$400 each?

Mr. Lennon: That is right.

Q. (By Mr. Lennon): You were shown a list of plumbing fixtures and other types of fixtures that were removed from the townsite?

A. Yes.

Q. And the fixtures referred to by Mr. Nicely the last witness? A. Yes.

Q. And I show you a list of fixtures, the same list that was referred to in the examination of Mr. Nicely, and ask you if that is a list of fixtures, the same list of fixtures that Mr. Nicely testified was removed from the townsite?

A. That is right. That is the same list.

Q. And have you put valuations on this list as to each item that was removed as shown on this list?

A. I have. [283]

Q. And those are the value of the fixtures that have been removed? A. That is right.

Mr. Lennon: If the Court please, I offer this in evidence.

Mr. Maury: Before it is introduced may we ask a few questions?

(Testimony of Lee H. St. John.)

The Court: Very well.

Q. (By Mr. Maury): Mr. St. John, on what is now for identification Exhibit No. 24, there are listed toilets 22 each, has your value assessed here of \$444; that is for all of the 22?

A. That is right.

Q. Laboratories, 22 each, \$195.58, is that the same?

A. That is the same.

Q. Kitchen sink, 22 each, \$207?

A. That is right.

Q. Tanks, water, 30 gallon capacity, \$313.50?

A. That is right.

Q. And showers, \$247.72, right?

A. Right.

Q. And mirrors, \$19.80?

A. Right.

Q. As to that could, the plumbing in that list there—what [284] would the plumbing in that list cost now here in Billings?

Mr. Lennon: Is it with reference to this you want to go through cross-examination?

Mr. Maury: No, we have a right to test out in a preliminary way whether this has any validity to be introduced in evidence.

Q. (By Mr. Maury): What would those items cost here in Billings? You have totaled them at \$1,424.17.

Mr. Lamb: Your Honor, we object as being entirely irrelevant what they cost in Billings.

Q. What would they cost to buy at the Mouat mine if they were there already?

(Testimony of Lee H. St. John.)

A. Well you mean cost of installation?

Q. I asked what the fixtures would cost?

A. For the one building?

Q. No, for all of those named in your first schedule here? A. Item by item?

Q. Yes.

A. Oh, I would say the first item would be about \$620.

Q. \$620? A. \$629.

Mr. Lamb: Your Honor, this appears to me to be cross-examination, not as preliminary questions to the [285] introduction of this exhibit. If he wants to cross-examine, we will give him full opportunity, but we offered this in evidence.

Q. (By Mr. Maury): Now who made this schedule?

A. That schedule was made up in our office?

Q. Did you help make it?

A. I verified it.

Q. I know you verified it but did you help make it? A. Yes, to a certain extent.

Q. Did you take any list of the stuff yourself?

A. I naturally had a man working on it.

Q. But were you there when he was working?

A. Yes.

Mr. Maury: All right, let it go in.

The Court: Very well, it will be received in evidence.

(Whereupon said Defendant's Exhibit No. 24, offered and received in evidence, is a part of this record and is in words and figures as follows, to-wit:) [286]

DEFENDANT'S EXHIBIT No. 24

Townsite Portion Mouat Lease

No. 1. House, 3 Room, 25'x24'x12'7", One floor wood structure 600 sq. ft., 1" sheeting and 1" drop siding. Total 22 each (all removed)

		Value
Toilets	22 ea.	440.44
Lavoratories	22 ea.	195.58
Kitchen Sink	22 ea.	207.13
Tanks, Water		
30 gal. Cap.	22 ea.	313.50
Showers	22 ea.	247.72
Mirrors	22 ea.	19.80

1424.17

No. 2. House, 3 room, 25'x24'x12'7", Description same as above, stripped and gutted. Total 11 each.

Toilets	11 ea.	220.22
Lavoratories	11 ea.	97.79
Kitchen Sinks	11 ea.	103.60
Tanks, Water		
30 gal Cap.	11 ea.	156.75
Showers	11 ea.	123.86
Mirrors	11 ea.	9.90

712.12

Defendant's Exhibit No. 24—(Continued)

No. 3. House 4 room, family dwelling intact without plumbing fixtures. Total 40 each. [287]

Bathtubs	40 ea.	1751.60
Lavoratories	40 ea.	446.40
Toilets	40 ea.	915.20
Kitchen Sinks	40 ea.	430.40
Medicine Chests	40 ea.	206.80
Tanks, Water		
30 gal. Cap.	40 ea.	570.00
		<hr/>
		4320.40

No. 4 House, Duples. Total 20 each.

Toilets	40 ea.	915.20
Lavatories	40 ea.	446.40
Showers	40 ea.	450.40
Medicine Chests	40 ea.	206.80
Tanks, Water		
30 gal. Cap.	40 ea.	570.00
Sinks, Kitchen	40 ea.	430.40
		<hr/>
		3019.20

No. 5. Bunkhouse, 42 man. 26'x4"x73'9"x21'3", two floor. Sq. ft. area 3750. 4 each total. (Heated from Central Heating Plant).

Toilets	16 ea.	366.08
Urinals	8 ea.	73.51
Lavoratories	32 ea.	325.12
Tubs, Laundry	8 ea.	121.00

Defendant's Exhibit No. 24—(Continued)

Radiators, C.I.	80 ea.	387.60
Radiators	16 ea.	109.20
”	16 ea.	109.20
Fountain, drink	8 ea.	80.00
		<hr/>
		1571.71

No. 6. Mess Hall.

Panel, elec. switch	1 ea.	47.50
Toilet	1 ea.	22.88
Lavatory	1 ea.	10.16
Tank, Cond.	1 ea.	150.00
Heater, Elec.	1 ea.	90.00
		<hr/>
		320.54

No. 7 Store Building.

Lavatories	2 ea.	20.32
Toilets	2 ea.	45.76
Heater, Steam	4 ea.	144.00
		<hr/>
		210.08

No. 8 First Aid House.

Lavatories	2 ea.	20.32
Bathtub	1 ea.	43.79
Medicine Chest	1 ea.	2.25
Toilet	1 ea.	22.88
Sink, Kitchen	1 ea.	10.76
Radiators, C.I.	4 ea.	27.30
Heater, Water	1 ea.	90.00
		<hr/>
		217.30

Defendant's Exhibit No. 24—(Continued)

No. 9. Post office. Intact.

No. 10. Garage. Intact.

Total \$11,795.52

— — —

(Testimony of Lee H. St. John.)

Mr. Lennon: Now you may cross-examine.

Cross-Examination

By Mr. Maury:

Q. You have listed here in No. 1, toilets, laboratories, kitchen sinks, tanks, water 30 gallon capacity, showers, and mirrors, in how many buildings? A. That is in 22 buildings.

Q. 22 buildings and what would the plumbing fixtures that were in those 22 buildings cost new?

A. They would cost around \$2,762.98.

Q. Break it down.

Mr. Lennon: You mean as for one item?

Mr. Maury: No, sir.

Q. Break it down as to pieces.

A. As to pieces?

Q. Yes, what would the water tanks have cost?

A. Water tank would cost about \$28.50.

Q. What would the kitchen sink have cost?

A. About \$13.45 apiece.

Q. What would the laboratory have cost?

A. \$12.70 apiece.

Q. What would the toilets have cost? [291]

A. \$28.60 apiece.

Q. What would the showers have cost?

A. \$40.84 apiece.

(Testimony of Lee H. St. John.)

Q. What would the mirror have cost?

A. \$1.50 apiece.

Q. Now where would that price be?

A. That price would be at the mine.

Q. At the mine. Have you figured the cost of delivery from Billings to the mine?

A. It was considered, yes.

Q. Sir? A. It was considered, yes.

Q. How much was considered for that?

A. I couldn't answer that question right now. I am not prepared to answer it.

Q. Sir?

A. I wouldn't be able to answer that question authentically at the present time.

Q. You don't know how much you have put into your estimate, do you?

A. Well now you are talking on restoration program.

Q. No, I am hardly subject to your criticism. I am talking on what it would cost new the plumbing here in Billings?

A. What I was going to do was explain to you.

Q. Oh, well, go right ahead.

A. You are speaking for the restoration program which I did not have full data at the present time to give you.

Q. Yes.

A. I could to some extent but not on a breakdown.

Q. You couldn't break it down? A. No.

(Testimony of Lee H. St. John.)

Q. Have you bought recently any articles such as are described here in Billings?

A. Not in Billings, no.

Q. Where is the closest place that you have bought any of the articles mentioned in this list?

A. Seattle.

Q. Seattle, of course, enjoys ocean freight?

A. It is a pretty high priced town. According to the Bureau of Statistics it is the highest price town in the United States outside of Billings.

Q. I know but you might answer the question it enjoys ocean freight? A. Yes.

Q. Now as to the No. 2 houses, those listed in No. 2, have you a copy of this?

A. I believe I have, yes.

Q. What could you get the plumbing for?

A. What is that? [293]

Q. What could you buy all of the plumbing in the No. 2 list here for in Billings?

Mr. Lennon: You are referring to plumbing fixtures or the whole thing?

Q. The whole thing?

A. Now you asked that question here in Billings?

Q. Yes.

A. Do you mean to go out and purchase those articles one by one from some retail store or purchase them by wholesale and in a large quantity and have them brought in as would be the case in a restoration program?

(Testimony of Lee H. St. John.)

Q. Yes, either way—both ways?

A. Well your question there is kind of funny owing to the fact that if a restoration program of that kind was to take place, those fixtures would not be purchased directly at Billings, that is, unless some purchaser could make his bid low enough to meet the requirements. You just don't go out and buy from the first man that has something to sell when you buy for a construction program on a large scale.

Q. Yes.

A. Consequently, owing to that fact I couldn't answer that question as to the price we could get them here in Billings for. I might answer the question what they might be laid out in Columbus for or up at the mine. I would say that we could put them up to the mine for about the same cost as [294] I mentioned before.

Q. Plumbing supplies and everything have gone up in the last three years in price?

A. To some extent, yes. However, we find it very difficult at times to get rid of it in Seattle.

Q. Now, Mr. St. John, we will get to that restoration. What would it cost to restore that plumbing to those buildings and put it in the position wherein it was in March of 1946?

A. You mean the 22 houses?

Q. I mean all of them that are on the leased ground?

(Testimony of Lee H. St. John.)

A. You mean the 22 houses and all the plumbing fixtures?

Q. Yes.

A. In all the buildings on the leased ground?

Q. Yes.

A. I would say roughly speaking in the neighborhood of ninety or ninety-five thousand dollars.

Mr. Maury: Thank you.

A. That is just roughly speaking.

Mr. Maury: That is all.

Redirect Examination

By Mr. Lennon:

Q. With reference to one particular house, any one of [295] the 22 that were removed, that the plumbing fixtures were removed, what would it cost to actually connect up in one particular house to reinstall the fixtures that had been removed?

A. To reinstall the fixtures that had been removed in one particular house?

Q. Yes. A. Those three-hoom houses?

Q. Any one of the 22 that have been removed assume the fixtures were laying outside and you had to reinstall them, what would be the cost of that in your judgment? A. Including fixtures?

Q. The five or six items there shown to re-connect them up, the plumbing?

A. Oh, I would say around \$125 a building.

Q. When you gave the figure to counsel for the cost of restoration is that figure given on the theory

(Testimony of Lee H. St. John.)

that there is reason for restoring them to the extent that the buildings have a commercial use?

Mr. Maury: We object to that; that has no connection with the cost of restoration. That couldn't enter into a calculation. I asked him for the cost of restoration but not purpose afterwards.

A. I will answer your question absolutely not.

Q. Did you say yes or no? [296]

A. I said no.

The Court: Read the question.

(Question read.) Q. When you gave the figure to counsel for the cost of restoration is that figure given on the theory that there is reason for restoring them to the extent that the buildings have a commercial use?

Mr. Maury: And I objected that couldn't possible enter into the statement of the compilation or estimate of the same; what use they were put to would have nothing to do with the cost.

Mr. Lennon: Just a minute, the court has to make a ruling here.

The Court: I will let him answer it.

Mr. Lennon: Read the question.

(Question read.) Q. When you gave the figure to counsel for the cost of restoration is that figure given on the theory that there is reason for restoring them to the extent that the buildings have a commercial use?

A. No, because I don't believe they have commercial use at the present time.

Mr. Maury: We object and move to strike out

(Testimony of Lee H. St. John.)

the latter part. We moved to strike out the last part of the answer as not being responsive.

The Court: Yes, strike it out. [297]

Q. (By Mr. Lennon): Mr. St. John, you just testified on cross-examination to Mr. Maury's question, the question that the restoration value of these items is \$95,000, \$90,000 or \$95,000?

A. Approximately that.

Q. Now with reference to that question and answer I ask you this question. When you gave that testimony as to the approximate restoration value is that value based upon restoring the fixtures to buildings which would then as restored have a commercial and useable value in place?

Mr. Maury: We object to that; it couldn't possibly enter into the cost of restoration and is entirely different from whether the buildings could be sold afterwards or not.

The Court: Well it seems to me that very question, the cost of restoration, really is to determine the value of that property. That is, what it would cost to restore it and put it back in place, the value of that. Now that hasn't anything to do with commercial value or whether it could be put to commercial use or not as I see it. What would it cost to restore it? Well, he testified what the value would be, restoration cost. That doesn't come into the calculation here I wouldn't think.

Mr. Lennon: I will withdraw my question then, your Honor, and the answer.

(Testimony of Lee H. St. John.)

Mr. Maury: We won't permit the answer to be withdrawn [298] unless the court forces us to. The answer stood there to my question. The answer stood there.

Mr. Lennon: I am withdrawing my question.

Mr. Maury: Oh, your question, that is all right.

Mr. Lennon: And the one before the last too and the answers.

Mr. Lennon: That is all.

Mr. Maury: That is all.

HENRY C. HELLAND

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lennon:

Q. What is your full name and address?

A. Henry C. Helland, Helena, Montana.

Q. You are a former employee of the War Assets Administration? A. Yes, I was.

Q. In what capacity?

A. I was Regional Director, War Assets Administration, Region 29, comprising the State of Montana.

Q. With offices at Helena?

A. With offices at Helena. [299]

Q. And when did you take over your duties?

A. I was appointed Regional Director in May of 1946, and held the position—and resigned the end of May of 1947.

(Testimony of Henry C. Helland.)

Q. And what is your employment at the present time?

A. I am General Manager, Carson Construction Company at Helena, Montana.

Q. And in the course of your duties as Regional Director did you have occasion to visit the Mouat mine site? A. I did.

Q. And you are familiar with the type dwelling house constructed on the leased area?

A. I am.

Q. And also the type of house off the leased area of the townsite, but on——

A. On Forest Service land.

Q. North of the "M" "N" line and west of the "N" "O" line? A. Yes.

Q. And were some of those buildings sold by War Assets Administration through your office?

A. Yes, I have known what buildings in the Mouat were sold.

Q. I am talking about the last mentioned group off the leased area?

A. Yes, they have been sold. [300]

Q. Some of those off the leased area have been sold, similar type buildings? A. Correct.

Q. And approximately how many were sold?

A. In the dwelling category there were 53.

Q. And what were they sold for?

A. Well there were thirty duplexes which were sold for \$500 per building, and there were 23 three-

(Testimony of Henry C. Helland.)

room houses which were sold for \$400 per building.

Q. Was that intact?

A. That was intact with plumbing fixtures complete.

Q. Now I show you Defendant's Exhibit No. 20. Will you state what that is, please?

A. Yes, this is a declaration of surplus, commonly known as SWPA-5, declared Plancor No. 587 on the Mouat mine and mill surplus, War Assets Administration.

Q. You use the words "Plancor No. 587", will you explain what that term is?

A. Plancor was a term used by the Defense Plant Corporation to enumerate the plants which were built by them and they were numbered for use in reference. Now the Mouat mine and mill was Plancor 587, which comprised not only the mill, the mine site, mine development, transmission lines, and the access road which were built under funds provided for Plancor 587. [301]

Q. Are you familiar with the type of the oil cooking stove that was in the buildings within the leased area of the townsite?

A. Yes, I am.

Q. Will you describe them, please?

A. Well the oil cooking stoves were a flat top iron top with white porcelain box on the stove consisting of an oven and cooking surface on the top. They were oil fired, connected to an oil tank, with a fan built in the stove for draft, an electric fan.

Q. And how were they connected with relation

(Testimony of Henry C. Helland.)

to the tank location and where the stove is located?

A. Well the stove, of course, is located in the kitchen with the pipe connecting to the tank which was located outside.

Q. That was commonly known as a cook stove?

A. That was a cook stove, yes. However, it was used for heating purposes because usually that was the only heat in the buildings.

Mr. Lennon: That is all.

Cross Examination

By Mr. Maury:

Q. Who did you sell these buildings to?

A. Well these buildings were sold subsequent to the time [302] I left War Assets Administration.

Q. And you don't know, of course, of your own knowledge what happened to them?

A. Yes, I do. We bought seventeen of them.

Q. Who bought them?

A. Lyons and Flynn of Billings bought 18, and McCan of Missoula bought 18.

Q. By you who do you mean?

A. Well, the Carson Construction Company.

Q. For whom you are the Manager?

A. Yes.

Q. And with whom did you deal when you bought these buildings?

A. Well the firm dealt with Reconstruction Finance Corporation.

Q. I know but—and when was that dealing taking place?

(Testimony of Henry C. Helland.)

A. That took place in the last of September of this year. We received a sales document on the 23rd of October.

Q. From Reconstruction Finance Corporation?

A. We received the sales document from War Assets Administration.

Q. Well the negotiations were with Reconstruction Finance Corporation?

A. Correct, but Reconstruction Finance Corporation was merely acting under section 18-e, surplus property, whereby [303] they were charged with the exercising of priorities for the purchase of surplus property for small business.

Q. And yours was small business?

A. Right.

Q. And you got the priority? A. Yes.

Q. For buying that property? A. Right.

Q. And that was priority over everybody else?

A. No.

Q. Who was there who was priority over you?

A. Well the Federal Government has top priority, any Government Agency.

Q. But the Federal Government had priority ahead of you? A. Yes.

Q. And you had the next priority?

A. Yes.

Q. Was that a public sale? A. Yes.

Q. When held?

A. The sale was held in Seattle. The documents were opened at Seattle.

(Testimony of Henry C. Helland.)

Q. The sale took place in Seattle? That is in the state of Washington? A. Right. [304]

Q. And how long was the sale advertised in Montana?

A. Oh, it was I would say about two weeks before then.

Q. Whereabouts? A. Whereabouts?

Q. Yes.

A. Well it was in the Helena Independent for one.

Q. Any Billings paper?

A. That I don't know; I am not connected with War Assets.

Q. You don't know what it was in?

A. I imagine it was in the Billings paper.

Q. You imagine so?

A. It is customary, yes, for them to put them in the larger city papers.

Q. Did it tell where the sale was to take place?

A. Yes.

Q. Where?

A. If you have read any of these War Assets Administration——

Q. No, my only contact with War Assets Administration was not with you in Helena when you were trying to sell this property.

A. In the advertisement they tell in what order the priorities will be taken up, and the points at which the bids will be opened, and how the bids are to be submitted, and what is to be submitted, de-

(Testimony of Henry C. Helland.)

posits or whatever else is to go [305] with the bids, and complete instructions with each advertisement.

Q. And in that advertisement why it was stated that you had a priority. A. No.

Q. I thought you said you had a priority?

A. Certainly. It didn't mention we had a priority. It said Federal Government of the United States, and Reconstruction Finance Corporation for assistance of small business No. 2.

Q. You were a R. F. C. priority for assistance to small business? A. Yes.

Q. All right.

Mr. McKevitt: Your Honor, it is a matter of statute; small business is a matter of statute.

Q. (By Mr. Maury): Do you know whether any other bids were put in but yours?

A. Yes, I know Lyons and Flynn of Billings and McCan Construction Company of Missoula.

Q. And were their bids exactly the same as yours?

A. Well for the sale of this property under priorities there is no actual bid.

Q. There is no actual bid? [306] A. No.

Q. There is nothing in the nature of an auction, whichever way you want to call it?

A. There is nothing in the way of auction for priority buyers.

Q. And who named the price that you were to pay? A. War Assets Administration.

Q. What person in War Assets Administration?

(Testimony of Henry C. Helland.)

A. The Real Property Disposal Division in Seattle. The Appraisal Division makes, sets the fair valuation at which they are sold to priorities.

Mr. Maury: That is all.

Redirect Examination

By Mr. Lennon:

Q. When were the fixtures sold that were removed from the Mouat lease property?

A. The fixtures were sold I would say some time after the 1st of September of 1946.

Q. Then they were sold by War Assets Administration?

A. All the fixtures were sold by War Assets, yes.

Q. With reference to the sale or purchase from R. F. C. no purchases were made by you personally, is that correct?

A. That is correct. [307]

Q. When they referred to you, you were talking about the firm for whom you work?

A. Carson Construction, yes.

Q. And according to statute the sale is made to R. F. C. and then R. F. C. to small business, that is by statute?

A. Yes.

Mr. Maury: The statute speaks for itself; the witness is not competent to tell us about the statute and we move to strike the answer.

The Court: You might put the statute in there if you make reference to it.

Mr. Lennon: You were asking about it and I have the right to clear that point up.

(Testimony of Henry C. Helland.)

The Court: I think so, but if you know the statute, give it.

By Mr. Lennon: You mean to ask the witness, sir?

Q. Do you know the citation?

A. Yes, under Section 18e of the Surplus Property Act.

Q. Of 1944?

A. 1944. Small War Plants Corporation was charged with responsibility of assisting small business in securing surplus property. When Small War Plants Corporation went out of existence the responsibility of helping small business was transferred to Reconstruction Finance Corporation. Then there was some question at the time of the limiting date of Small [308] War Plants Corporation as to whether that right would still vest in Reconstruction Finance Corporation but it has since been clarified and decided that they are still charged with responsibility of aiding small business.

Mr. Lennon: That is all.

Mr. Maury: That is all.

DANIEL E. McCARTHY

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lennon:

Q. State your full name and address?

A. Daniel E. McCarthy, Columbus, Montana.

(Testimony of Daniel E. McCarthy.)

Q. And you are in the employ of War Assets Administration at Columbus, Montana?

A. Yes, sir.

Q. In what capacity?

A. I am in charge of personal property, in charge of warehouse and the office.

Q. In Columbus? A. Columbus, yes.

Q. And have been how long?

A. I have been acting in this capacity since about [309] March of this year and I have been working down here at Columbus since the first part of September in 1946.

Q. Are you familiar with the disposal of the fixtures, plumbing fixtures and other fixtures that were removed from the Mouat mine?

A. Yes, sir.

Q. I show you Defendant's Exhibit No. 24 showing the list and price or rather value, showing the items of personal property—or I will strike that out—items which were sold here, that is, sold at your office?

A. The majority of them have been.

Q. And were you requested to abstract from the documents in your office the particular items as referred to on that sheet? A. Yes.

Q. And you made that compilation?

A. Yes.

Q. As to the items? A. Yes.

Q. And the values that are placed along side of each item will you state what those values represent?

(Testimony of Daniel E. McCarthy.)

A. Well this value that is estimated here represents an estimated sales return value.

Q. And the value set along side each item is what the item was sold for by War Assets? [310]

A. That is correct.

Q. Now do you know anything with reference to the instructions that were given concerning whether or not Mr. Mouat could go on the mine site?

A. Mr. Mouat was granted the same privileges that was granted to anyone else or any party or any individual or group of parties that wanted to inspect the mine, mill site or mine site. Wherever there was surplus things or property being inspected he was granted those same privileges.

Mr. Lennon: That is all.

Cross Examination

By Mr. Maury:

Q. Did you issue a pass to him?

A. Offhand I won't say for sure, although I have issued numerous passes to individuals.

Q. This was the kind of pass that was issued?

A. This was one type of pass that was issued, yes.

Q. And I am calling your attention to Exhibit No. 3? A. Yes.

Q. Now to whom did you sell this fixtures and plumbing and everything?

A. These fixtures were sold to various buyers.

(Testimony of Daniel E. McCarthy.)

In fact, [311] the majority of them went to other Federal Agencies. By that I mean Bureau of Reclamation or the Federal Public Housing Authority.

Q. And the prices were just bookkeeping entries between the departments of the Government?

A. Repeat that question.

Q. The prices were simply bookkeeping entries between departments of the Government?

A. Yes.

Q. What department were some of them sold to?

A. The Bureau of Reclamation, Billings, Montana.

Q. And that is a department of the United States Government?

A. Correct.

Q. What were the others sold to?

A. Federal Public Housing Authority received some of these fixtures. I believe they received some of them. They received all the fixtures that was in the 22 buildings that were torn down.

Q. And when was that received? When did they get possession of it?

A. Oh, in September or October.

Q. What year?

A. 1946.

Q. Were you connected with the War Assets Administration [312] then or not?

A. Yes.

Q. And then as to the rest of the fixtures who got them?

A. Well various individuals received, oh, maybe five or six items of each type. Offhand I couldn't

(Testimony of Daniel E. McCarthy.)

tell you every individual that purchased them. There were several individuals that bought them at some of the sales that were conducted.

Q. Did you keep books on those? A. Yes.

Q. And were you requested to bring your books here to the trial? A. No, I wasn't.

Q. Every item was mentioned in those books, was it not, Mr. McCarthy? Every item sold was mentioned, wasn't it?

A. They were documented.

Q. What? A. They were documented.

Q. Documented? A. On paper, yes.

Q. And you had charge of the documents?

A. That is correct.

Q. Exact lists were made, were they not?

A. Exact list were made by our office in conjunction with personnel from Helena in the Helena office.

Q. But yours was added to the duplicated original set? [313]

A. Yes, we have a delivery copy for the delivery on release of these items.

Q. Mouat didn't have any more right to go in there than anyone else, did he as far as your authority was concerned?

A. I would like to have you say go in where.

Q. To the Lake Placer to all of those buildings that are on the leased ground?

A. As far as I am concerned he was granted the same privileges as any other individual.

(Testimony of Daniel E. McCarthy.)

Q. But no greater privileges than any other individual?

A. Personally I did extend him more privileges.

Q. What were the nature of those privileges?

A. Well I took it upon myself and I said he could go in there whenever he wanted and he came to my office several times in quest of bulletins and what not and he was always favored in that respect.

Q. Yes, you gave him bulletins about what you were going to do with the property, is that it?

A. Yes, when he asked for them.

Q. Now at times he had to call you on long distance from the property or the lower camp to Columbus to get permission to go in, didn't he?

A. No, sir.

Q. Were you there on or about the first week in September, 1946? [314]

A. I was in the Columbus office, yes.

Q. When there was a call came in that Mouat and other people couldn't go through?

A. The time you are referring to in September I was not in charge of that office.

Q. Were you there?

A. I was working there.

Q. And you heard that call? A. No, sir.

Q. You don't know of that? A. No.

Mr. Maury: That is all.

Redirect Examination

By Mr. Lennon:

Q. The document that you have there, Defend-

(Testimony of Daniel E. McCarthy.)

ant's Exhibit 24, is this an abstract of the voluminous record you have on file in your office?

A. Yes.

Mr. Lennon: That is all. [315]

Recross Examination

By Mr. Maury:

Q. How voluminous is that record? I mean so far as it pertains to this property.

A. It is a fairly accurate estimate as to the quantity and values there of it.

Q. Is it loose leaf? A. Pardon.

Q. Is it on loose leaves? A. No, sir.

Q. How big is the book that they were written in?

A. It was compiled of data that was their form of bookkeeping. When this paper was recorded it is on one document and then it is sold, maybe one item might be reported as quantity of 22 each and it might have been sold to several individuals and we have different documents for each different sale and it is compiled.

Q. Who made the abstract here?

A. Various War Assets personnel including myself.

Q. Who were some of them?

A. Myself, Mr. Nicely, Mr. St. John.

Q. Those were the three that got access to the original documents, to the original entries?

A. And Mr. Newton another employee in the warehouse. [316]

(Testimony of Daniel E. McCarthy.)

Q. And they had the original documents in the warehouse? A. That is correct.

Mr. Maury: That is all.

Redirect Examination

By Mr. Lennon:

Q. And each sale is documented and you had to refer to each one of those documents to get this data, is that correct? A. That is right.

Mr. Lennon: That is all.

Mr. Maury: That is all.

ARTHUR S. HUTCHINSON

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. McKevitt:

Q. Your name, please.

A. Arthur S. Hutchinson.

Q. Where do you live?

A. Washington, D. C.

Q. By whom are you employed?

A. Reconstruction Finance Corporation. [317]

Q. What degree do you hold?

A. I am a graduate of Stanford Law School.

Q. Do you hold an engineering degree?

A. No, I am a lawyer.

Q. Are you the Mr. Hutchinson who was in court yesterday and referred to? A. I am.

Q. In the testimony of Mr. John Norton?

A. Yes.

(Testimony of Arthur S. Hutchinson.)

Q. And you were here and heard the testimony of Mr. Norton? A. I did.

Q. Mr. Hutchinson, do you agree with the testimony——

Mr. Maury: We object as not a proper question—do you agree with the testimony of a certain witness? He can give his own testimony.

Mr. McKevitt: Your Honor, I am trying to shorten this. I think it is proper enough.

The Court: Well you can ask him if he sat here and heard it all and heard every word of it and if it is correct as he understood it.

Mr. McKevitt: That is what I am trying to do is shorten it down.

Q. (By Mr. McKevitt): You heard the entire testimony of Mr. Norton yesterday? [318]

A. Yes.

Q. Do you agree with the testimony given in this case yesterday by the witness John Norton with respect to conversations had with Mr. Mouat at the time the lease involved in this case was being negotiated? A. I do.

Q. And you are the Mr. Hutchinson who was present the the negotiations for the lease involved in this case? A. Yes.

Q. Mr. Hutchinson, did you have any conversation with Mr. Mouat at the time with respect to including the word “townsite” in paragraph 22 of that lease?

Mr. Maury: We object as an attempt to vary the contents of a written document that has not been

(Testimony of Arthur S. Hutchinson.)

put in issue in this case; it has been agreed to in the answer as being the exact copy.

Mr. McKevitt: Your Honor, this is along the same line of the testimony we used yesterday.

The Court: Yes, I said I would let them show their theory of it and we will see what they are trying to do; whether they will succeed or not will depend on what the court concludes later on. It will be received subject to objection.

Mr. Maury: All of it along this line.

The Court: Yes, all of it.

Mr. McKevitt: Read the question. [319]

(Question read.)

Q. Mr. Hutchinson, did you have any conversation with Mr. Mouat at the time with respect to including the word "townsite" in paragraph 22 of that lease?

A. I was present during negotiations.

Q. Would you answer that yes or no?

A. Yes, I was present during the negotiations which were conducted primarily by Mr. Norton with Mr. Mouat.

Q. Would you repeat the substance of that conversation with respect to including the word "townsite" in the lease, paragraph 22 of the lease?

A. Well in June of 1941, Mr. Norton was out here and negotiating with Mr. Mouat for a lease. That lease was not acceptable to Reconstruction Finance Corporation but I used it as a form for preparing the lease in evidence. That lease of '41, among other things, provided—

(Testimony of Arthur S. Hutchinson.)

Mr. Maury: We object to any statement of the contents of that lease unless the lease is here.

The Court: Confine your answer to this particular question.

A. Well Mr. Norton informed Mr. Mouat that more than one townsite, more than one mill site, more than one tailing disposal, and such matters, would undoubtedly be required and it would be necessary to put all of those terms in the plural in this lease that is in issue.

Q. And how much land did you ultimately decide would be [320] needed for the townsite and millsite purposes? A. 200 acres.

Mr. McKevitt: That is all.

Mr. Maury: Just a moment, have you got that old lease, copy of that old lease?

Cross-Examination

By Mr. Maury:

Q. Would you recognize a carbon copy of that first lease, Mr. Hutchinson?

A. I think I would.

Q. Would you say that this document excluding the pencil notations in red and black was a carbon copy of that first lease you are talking about excluding the pencil notations?

A. Yes, I am going to exclude the pencil notations. Well, this looks as if it might be. I notice in paragraph 24 here it refers to "Promptly upon receipt of lessee's written request, lessors will execute and deliver to lessee a quit claim deed to all of lessors' right, title and interest in and to prop-

(Testimony of Arthur S. Hutchinson.)

erty to be designated by lessee for use by lessee for mill sites and stock piling." Now, I used affidavits——

Q. Is that a carbon copy?

A. I say it looks like one. I have a carbon copy of it. [321]

Q. Will you produce that?

A. Yes, I will.

Q. Your own copy?

A. Yes, I would rather use it. If you hadn't objected, I could have saved a little time. Here is a carbon copy. That is the carbon copy I used when we were here in December, 1941, to prepare the present lease.

Q. And this, of course, has many interlineations?

A. It has as a result of conferences and negotiations with Mr. Mouat. Those are the things that we insisted upon and some that he insisted upon. Down there, 22, at the bottom of the page, Mr. Maury.

Q. Yes, I will get it. This document was in existence in June, 1941, wasn't it, Mr. Hutchinson?

A. I believe it was as a piece of paper.

Q. And was it written on?

A. I don't know what you mean was it written on.

Q. Was the carbon copy made then, Mr. Hutchinson?

A. I don't know as to that. I believe it was for the reason that you notice that it is what is called

(Testimony of Arthur S. Hutchinson.)

a conformed copy; it shows the signatures in type-writing.

Mr. McKevitt: Do you want to put the document in because the record won't otherwise show what we are talking about.

Mr. Maury: Yes, I will identify it. [322]

Whereupon said document was marked for identification Plaintiff's Exhibit No. 35.

By Mr. Maury:

Q. And this lease drawn in June of 1941 about six months before the present lease had this wording in it, did it not, Mr. Hutchinson? Paragraph 17 it was; it is now penciled in "15"?

A. That is right.

Q. "Upon the termination of this lease by either party, lessee shall surrendered peaceably the leased premises and appurtenances in good order with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and the lessors shall have the right to re-enter upon said leased premises and appurtenances—can you read what was there under what is penciled?

A. And possessory claims.

Q. Yes, sir. "and take full and complete possession of the whole thereof. Upon the expiration of this lease or the termination of this lease for any reason by either party, lessee shall have six (6) months additional time to remove from the leased premises its personal property, equipment, machinery, tracks and tramways, but shall leave intact all

(Testimony of Arthur S. Hutchinson.)

mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings [323] erected upon the demised premises and ore on dumps upon which royalties have not been paid lessors." That was in the lease of June? A. Yes.

Q. In fact there was very little difference between the lease of June and the lease of September except the lease of June called for minimum royalty of \$30,000. per year and the lease of December for a minimum royalty of \$10,000?

A. No, that isn't at all correct.

Q. Now was paragraph 22 in this original lease drawn in June: "Lessee agrees with the Lessors that unless there is an understanding to the contrary in writing, anything remaining on the premises herein demised and leased upon the termination hereof, for a period of six months after such termination, shall conclusively be deemed to have been abandoned by the Lessee in favor of the Lessors."

A. Yes.

Q. That was in both leases. I think I can finish with you in a minute or two. Were you present when M. W. Mouat signed the lease?

A. Oh, yes.

Q. Where was it signed?

A. I think at his house at the—I guess you call it Nye.

Q. At Nye there, the camp there? A. Yes.

Q. And when you got there there was present Judge Henry L. Myers? A. Yes.

(Testimony of Arthur S. Hutchinson.)

Q. Yourself? A. Yes.

Q. M. W. Mouat? A. Yes.

Q. Mrs. Mouat? A. Yes.

Q. Was Mrs. Mouat in bed when you arrived?

A. Not that I know of. When I walked in the house Mrs. Mouat was up and about and I was introduced to her.

Q. Cooking dinner?

A. I think she was because I enjoyed a dinner there.

Q. Now the discussion that you talk about between Bill Mouat, as we call him, and John Norton, where did that take place?

A. There were numerous discussions.

Q. Well where did one of them take place?

A. Give me a chance and I will tell you. They started in the Grand Hotel.

Q. Yes.

A. And then we adjourned to the Montana Power Company office.

Q. Yes. [325]

Q. Yes.

A. And stayed there until two o'clock in the morning.

Q. Yes.

A. Writing and having this lease typed.

Q. Yes.

A. And Mr. Mouat negotiated and discussed the terms during all of those times.

Q. Yes.

A. Right up until the last page was typed.

(Testimony of Arthur S. Hutchinson.)

Q. And then when it was typed you all the next day some time drove about ninety miles to where Mrs. Mouat was? . A. That is my recollection.

Q. And Judge Myers or Senator Myers walked in and said "Mrs. Mouat, sign here." And she said "I can read, you don't have to"—you were trying to read it to her? A. I was?

Q. Yes.

A. Well I may have read some section or paragraph that she asked me to read but I have no recollection of reading the lease to her; I deny anything of that sort.

Q. I know, but she informed you that she could read herself, didn't she?

A. No. She may have there was some visiting going on I dare say.

Q. And that is all the conversation about business matters [326] that took place in that house?

A. No, that was not all the business conversation. Mr. and Mrs. Mouat called me in the dining room and asked me if there was anything in that lease they didn't understand and did I think it was a fair lease and all right for them to sign and I told them I was an employee of the Reconstruction Finance Corporation, an instrumentality of the United States Government, and I thought they were getting a very fair lease and I didn't see any objection to their signing it.

Q. And they both thanked you?

A. I think so.

(Testimony of Arthur S. Hutchinson.)

Q. And now you have detailed to the court all the conversation that took place about the lease to Mrs. Mouat?

A. I wouldn't say that. I can't remember all the details of the conversation that took place six years ago. I will give you the substance.

Q. Now was there anything else or substance that was said to Mrs. Mouat, if so, tell the court what is was on that day?

A. I don't recall anything else or substance that was said to Mrs. Mouat by me.

Q. Do you recall anything else or substance said to Mrs. Mouat as to what Senator Myers said "Here is the lease; read it, sign it."?

A. I don't recall that Senator Myers said "Here is the [327] lease; sign it." I don't recall that language. If you doubt Mrs. Mouat can read—she read the lease and discussed it thoroughly with her husband.

Mr. Maury: We move to strike out the answer as a voluntary statement.

The Court: Yes, let it go out.

Mr. McKevitt: Have you offered this or is it simply for identification?

Mr. Maury: Just for identification and for those two paragraphs.

The Court: I think the record will show that identification of it is called to his attention or is in the record, is it not?

Mr. Maury: I don't think it is identified.

(Testimony of Arthur S. Hutchinson.)

The Court: I think you better identify it so we will know.

Mr. McKevitt: I think we might explain what has been marked Defendant's Exhibit No. 25 and referred to on cross-examination by that name should be Plaintiff's Exhibit 25 for identification. Would that be sufficient?

The Court: The cross-examination of this witness referred to that document, is transcribed on Exhibit 25.

Mr. Maury: That is penciled all over and monograms put on that I don't understand. [328]

Redirect Examination

By Mr. McKevitt:

Q. Mr. Hutchinson, referring specifically to Plaintiff's Exhibit No. 25 for identification, which is the instrument from which counsel just read, what is marked in here 24 and stricken out and 22 shown above it, which reads as follows: "Promptly upon receipt of Lessee's written request, Lessors will execute and deliver to Lessee a quit claim deed to all of Lessors' right, title and interest in and to property to be designated by Lessee for use by Lessee for mill sites and stock piling." Now I ask you to look at the exhibit and tell me whether a word has been added there in pencil writing?

A. Yes.

Q. And what is the word? A. Townsite.

Q. And would you explain to the court why it was necessary to add "townsites"?

(Testimony of Arthur S. Hutchinson.)

Mr. Maury: Objected to as not proper redirect examination.

Q. Was there any discussion with Mr. Mouat with respect to necessity of having fee title to townsites?

A. Yes, this form which is the June, 1941, instrument did not have any reference to townsites or tailings disposal area, and Mr. Norton explained to Mr. Mouat in my presence [329] at length the necessity for the Government having mill sites and town sites, and stockpiling area, and tailings disposal area, and I wrote the word "townsite" in there and after further discussion it was changed to townsites, plural, and that is the way it is in the lease in issue.

Q. And what was that necessity?

Mr. Maury: We object as too remote and further attempt to vary a written instrument not in issue.

(Witness): I don't think it is remote.

Mr. Maury: We don't ask for your opinion. We ask for the court's opinion.

Mr. McKevitt: Your Honor, the plaintiff started all this on cross-examination on this instrument.

The Court: Yes, I think, so let him state briefly in reply.

(Witness): This pertains to the negotiations for the lease.

Mr. McKevitt: Excuse me, Mr. Hutchinson.

Mr. McKevitt: Would you read my question?

(Testimony of Arthur S. Hutchinson.)

(Question read.) Q. And what was that necessity?

Mr. Maury: We object, the witness is not competent to answer what the necessity was. That would be dependent on mining engineers, metallurgists, road builders and everything.

The Court: Well I expect that objection would be good. I will sustain it and you will have to stop and qualify [330] him if you can. We will quit here and take a recess until two o'clock this afternoon.

The court resumed, pursuant to recess, at 2:00 o'clock P.M. on November 14, 1947, at which time parties and counsel were present.

The Court: Proceed, Gentlemen.

(Arthur S. Hutchinson resumed the stand and testified as follows:)

Redirect Examination—(Continued)

By Mr. McKevitt:

Q. Mr. Hutchinson, in your discussion with Mr. Mouat was it explained why it was necessary that the word "townsite" be included in what is now paragraph 22 of the lease? A. Yes.

Q. And what was the reason it was so explained in that conversation?

A. We told Mr. Mouat that this was going to be a very large undertaking and a great deal of money was going to be spent and we had to have so-called

(Testimony of Arthur S. Hutchinson.)

fee land, that is, land that would be owned by the Government on which these expensive improvements would be placed. [331]

Q. You mean townsite improvements?

A. Yes, townsite and millsite.

Mr. McKevitt: That is all.

Recross Examination

By Mr. Maury:

Q. Mr. Hutchinson, and you got that so-called fee land in the condemnation suit, 200 or more acres?

A. I had nothing to do with the condemnation suit, Mr. Maury.

Q. Well you know that to be a fact that 200 or more acres was obtained in the condemnation suit, don't you?

A. Only through hearsay. I have had nothing to do with condemnation.

Mr. Maury: That is all.

Redirect Examination

By Mr. McKevitt:

Q. You said you didn't know about this condemnation?

A. Nothing but hearsay. I understand a condemnation suit is either pending or been decided.

Mr. McKevitt: That is all.

Mr. Maury: That is all. [332]

Mr. McKevitt: This exhibit marked Plaintiff's

(Testimony of Arthur S. Hutchinson.)

Exhibit No. 25, is that admitted into evidence? Have you offered it, Mr. Maury. I want to be certain of that.

Mr. Maury: I don't think there is any need to offer it. Certain sections were read from it. We object to it as tending to encumber the record, and to attempt to explain the contents of a written instrument by negotiations that were prior to it and all deemed intermerged and when the written instrument is not put in issue in the pleadings.

Mr. McKevitt: Your Honor, we have been talking a lot about the instrument; it was used by the plaintiff.

The Court: Yes, it shows the hours and days of the discussion and preparation that occurred before the final makeup of this agreement that the suit is about. I think that is a part of it. They talked that over and talked it all over before they executed the agreement, the lease. It might have some bearing inasmuch as there has been considerable testimony concerning it. I don't see any objection to allowing it to go in evidence.

Mr. McKevitt: Just to be straight, Mr. Maury didn't offer it and I am offering it, so we better change the suggested designation of it.

The Court: All right, let it go in subject to objection of counsel.

Mr. McKevitt: Will you have the record show, Mr. [333] Reporter, what has been previously re-

(Testimony of Arthur S. Hutchinson.)

ferred to as Plaintiff's Exhibit No. 25 is actually Defendant's Exhibit No. 25 officially in the record.

The Court: Very well.

Whereupon said Defendant's Exhibit No. 25, being Mining Lease, dated June 21, 1941, offered and received in evidence, is a part of this record.

(Defendant's Exhibit No. 25 is not typewritten into this record for the reason that photostatic copies of said exhibit would furnish a more accurate and complete description of same, and such photostatic copies could be furnished by counsel.) [334]

ROBERT BURGO

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lamb:

Q. Your name is Robert Burgo?

A. That is right.

Q. And you are the Chief Clerk in the Land Office of the Department of Interior at Billings, Montana, is that correct?

A. That is right.

Q. And as such you have charge of the official records in the Land Office?

A. Yes.

Q. As Chief Clerk?

A. Yes.

Q. I will show you an instrument marked De-

(Testimony of Robert Burgo.)

fendant's Exhibit No. 26, and ask you if this is a certified true and correct copy of records which are maintained in your office and which you have official custody thereof? A. It is.

Mr. Lamb: At this time we offer Defendant's Exhibit No. 26 in evidence.

Mr. Maury: We object to the introduction of the exhibit in evidence for the reason that it is not permitted [335] in Montana for a tenant to in any wise impeach the landlord's title after the tenant has once taken possession of the land under the lease. That the action is upon a written lease which has not been put in issue in the pleadings but which has been admitted. The evidence conclusively shows that the tenant did take possession under it and maintained possession under it, and that the present tenant is by the same under the same liabilities and duties by Act of Congress as the original tenant, the Metals Reserve Company. And, further, that in this very lease there are statements that the lessee would defend and sustain the title to any property that was not held by patent but that was held by location and that this property was held, it shows was held by location and——

Mr. Lamb: What paragraph is that, Mr. Maury?

Mr. Maury: I will get them for you and I will show you. 15 is one of the places. "Upon the termination of this Lease by either party, Lessee shall

(Testimony of Robert Burgo.)

surrender peaceable the leased premises and appurtenances in good order with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met,"

Mr. Maury: That is one of the places that they promised to maintain the possessory claims, but that is not at all necessary. There are two other places. Now in para-12; the Lessee agrees that it will defend the said leased [336] property. In paragraph 13 the Lessee says: "and Lessee shall, nevertheless, make and comply with all obligations and payment for the maintenance of the demised premises and possessory rights, claims and permits up to the said time of re-entry by Lessors," In three places in this lease but regardless of that that is not the law.

The Court: What is this exhibit?

Mr. Lamb: Your Honor, if you please, this is the decision of the Department of Interior acting under the Secretary of Interior determining the legality of the Lake Placer claim on which this particular townsite and these buildings are situated. As the court well knows, you can pull one or two words out of a paragraph and create any contention you might desire in some of the references. And in defending our references to mechanics *lines* that may be fixed against the property and so on this

(Testimony of Robert Burgo.)

particular decree or decision of the Secretary of Interior——

Mr. Maury: It is not a decision of the Secretary of Interior.

Mr. Lamb: Just a moment, Mr. Maury. You may have any answer to this when I finish. This decree or decision of the Land Office of the Department of Interior is offered in connection with the question as it relates to the value of the property to the plaintiffs insofar as the alleged dates which have been attempted to be proved here for the holding over by the War Assets Administration and the Reconstruction Finance Corporation. That is one particular issue that was put in by the plaintiffs themselves to which we are entitled to——

The Court: In what respect does this decree have any bearing on value as shown here in this case?

Mr. Lamb: Your Honor, this particular decree shows there was invalid entry by Mr. Mouat on this particular claim and that at no time did he have any title or interest in this particular claim because of illegal entry or improper application.

The Court: Does it make any reference to any buildings or structures erected on that property? Is that what you mean by showing no value or less value?

Mr. Lamb: Well apparently an attempt has been made to secure judgment for damages for holding

(Testimony of Robert Burgo.)

over. Now if Mr. Mouat has no title nor interest in this particular property, the defendant in the case is an agency in this particular case and the fee title in the Lake Placer claim has been in the United States of America throughout and, in fact, the United States, the Metals Reserve, which is also an agency of the United States, also secured a forest permit from the Forestry Department for this particular claim, and inasmuch as the original entry itself is found insufficient in this particular case, we couldn't be guilty of trespass and [338] removing any of the property, the buildings upon that particular property.

The Court: Are any of the buildings on that particular property?

Mr. Lamb: Yes, your Honor, it is this particular townsite, the Lake Placer claim that has been determined in that particular hearing as illegal and improper entry. That it was entry he had no right, no proper findings to ever make an application for a mining claim on that particular area, and the United States of America at all times has held the fee title, and this particular decision will revert back to his original entry to this particular proceedings.

The Court: It has a bearing on this piece of property?

Mr. Lamb: Yes, your Honor, it is this particular piece right here.

(Testimony of Robert Burgo.)

The Court: I haven't got time to read the thing through now. I don't know what the purport of it might be. I am not going to stop to read it but we will receive it subject to the objection of counsel. I will not turn it down entirely or accept it either, but receive it subject to objection and I will read it over some time in the future.

Mr. Lamb: Yes, your Honor.

Mr. Maury: Well we make the further objection that that isn't final; that there is still twenty some days [339] in which to appeal to a higher officer of the Land Office, and we state that that appeal will certainly be taken.

The Court: That is an entirely different phase of it.

Mr. Maury: Yes.

The Court: That appeal is in the process of being taken? You have time to appeal?

Mr. Maury: Yes, the time to appeal has by no means expired and that appeal will certainly be taken and in time.

(Whereupon said Defendant's Exhibit No. 26, offered and received in evidence, is a part of this record and is in words and figures as follows, to-wit:) [340]

DEFENDANT'S EXHIBIT NO. 26

United States

Department of the Interior

Before Acting Manager, District Land Office, Billings, Montana

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

M. W. MOUAT, ET AL,

Defendants.

Involving Lake Placer Mining Claim, Contest No. 1508, Billings 2120791.

Decision

November 5, 1947

Hearing Before The Acting Land Manager Held June 24 to June 26 Inclusive.

Witnesses testifying for the Government:

Mr. Walter H. Koch, Mining Engineer and Field Examiner for the Bureau of Land Management.

Mr. Hugh Nicely, Mining Engineer, employed at the MOUAT Mine since April, 1942; first, as Mine Foreman, then as Mining Engineer for the Reconstruction Finance Corporation, and afterwards maintenance engineer for the War Assets Administration.

Mr. Charles Buck, one of the original locators of the Lake Placer Claim.

Witnesses testifying for the Defendants:

Defendant's Exhibit No. 26—(Continued)

Mr. Edgar J. Strasburger, Civil & Mining Engineer.

Mr. Malcolm W. Mouat, prospector and agent for the group of locators. [341]

Mrs. May Paula Mouat, wife of Malcolm W. Mouat, and one of the locators.

Mr. A. H. Dahle, specialist in mining, milling and construction of milling plants, Quartz Lode Mining and general mining.

Mr. Verner A. Gilles, Civil & Mining Engineer.

The taking of testimony took up all of the three days, June 24, 25, and 26, much of it being, in my opinion, immaterial and irrelevant to the question at issue—that of proving valuable mineral discovery, etc. Mr. Caplin, counsel for the Government, raised many objections; however, in accordance with the rules of practice, the objections were noted and the questions and answers were allowed to go on the records, so that defendants can have no complaints about evidence being suppressed which they considered valuable.

The records consist of 258 pages of transcribed testimony in addition to exhibits consisting of ore samples, certificate of assayers, map, plats and copy of agreement and lease between May Paula Mouat and M. W. Mouat, wife and husband, May Paula Mouat, as trustee parties of the first part. Edward Sampson, party of the second part, and Metals Reserve Company; after the taking of testimony, Mr. Maury, counsel for defendant, requested 30 days

Defendant's Exhibit No. 26—(Continued)

after receiving the transcribed testimony to make a brief, and Mr. Caplin, counsel for the Government, agreed to this with the stipulation that he would have 20 days to reply to Mr. Maury's brief.

Owing to the shortage of competent stenographers and the low remuneration paid for taking and transcribing testimony, it is very hard to get anyone to take on this work, however, we were very fortunate in securing the services of Mrs. Gladys Huntington for the job. Mrs. Huntington has made an excellent job of this very difficult and complicated work. She told us that owing to her other duties and obligations, it would take some time to transcribe the testimony. This took about six weeks and with the extensions of time granted for making briefs has caused considerable delay.

After the briefs had all been submitted, Mr. Maury requested permission to submit additional evidence. This has been treated as a request for a rehearing. In addition to the above, our office for the past month has been swamped with Oil and Gas lease applications and checkers seeking oil lands, taking up the most of our time, so that I have to consider this case mostly on non-work days.

Mr. Koch testified that he had found no evidence of Placer mining operations on the claim. He had spotted the location of the discovery cut and the corners of the claim from the location notice as given in the notice of location recorded in the

Defendant's Exhibit No. 26—(Continued)
county records, and from a map supplied by Mr. Hugh Nicely, who accompanied him in his examination of the claim.

Mr. Nicely was the Supervising Engineer for the War Assets Administration in charge of the chrome properties operated by [343] the Reconstruction Finance Corp. on the Stillwater River, Montana. Along with Mr. Nicely, he had a bulldozer excavate a cut 50 feet long, 12 feet wide, and 7 feet deep in the center, tapering off to zero towards both ends. The reason for making the cut 7 feet deep was because in the location notice, it was claimed the discovery cut was 5 x 7 feet and 10 feet long. It did not state whether the 5 feet was depth or width so to play safe, they made the excavation 7 feet deep.

This excavation was made about 50 feet north of where they had spotted the location of the discovery should be, as the slope at that point was too steep for a bulldozer to work on. He took two samples from the deepest part of the cut and panned them and found there were no heavy minerals in them—no gold, no black sand, and no chromite. In his complete examination of the claim, he did not find any evidence of valuable minerals which could be called discovery sufficient to warrant a prudent person in expending money for development of claim, and there is no difference from a mineral standpoint, between the mineral character of the original location, the first amended and the second amended location.

Defendant's Exhibit No. 26—(Continued)

In his cross-examination of Mr. Koch, Mr. Maury, chief counsel for Mr. Mouat, took up considerable time in propounding questions regarding the values and amounts of different claims. Mr. Caplin, counsel, for the Government, objected to many of the questions as irrelevant and having nothing to do with [344] proving discovery on the Placer Claim. However, in accordance with the Rules of Practice, these objections were noted and the questions and answers allowed to go on the records.

Mr. Koch stated that during the war chrome ore from the adjacent Lode claims was processed, the chromite ore removed and the so called tailings discarded, which contained olivine and serpentine, from which the magnesium could have been recovered. This was at a time when there was an enormous demand for magnesium and large plants were built by the Government at enormous expense. The Government operations and many private operations are now closed down.

Mr. Charles Buck testified that he was one of the original locators of the claim and that he had become a locator on the claim at the request or suggestion of Mr. Mouat, as remuneration for some work he had done on the claim, primarily prospect work and the digging of a small pit about 3 or 4 feet deep and about 3 x 3. He had made no other excavations on the claim.

On February 2, 1942, he gave a quit claim deed

Defendant's Exhibit No. 26—(Continued)
to Mr. Mouat for the claim, and after giving the quit claim deed, Mr. Mouat mentioned that his part was through. Mr. Mouat had given him \$25.00 which Mouat assumed to be the value of the time that he, Buck, had put on the claim. Subsequent to that, he had no interest in the claim.

There was no written agreement with Mr. Mouat or May Paula Mouat that Mrs. Mouat was to act as trustee, nor had he any [345] knowledge of verbal understanding. He could not recall authorizing anyone to use his name on the second amended location made on April 17, 1946.

On cross-examination by Mr. Maury. Mr. Buck repeated he had been given \$25.00 as a consideration for signing the deed, that he had no promise of a further interest in it, but he understood from Mr. Mouat that after everything was completed, he would have an interest coming back.

On page 189 of the transcribed testimony, lines 4 to 9, the following question was put to Mr. Mouat:

Q. "Do you consider that you or Mrs. Mouat are now the sole owners of the Lake Placer Claims?"

A. "No, sir. We did, however, buy up this man, Charles L. Buck. I looked at a deed today. I have the original deed here that he put in with Senator Myers, but as I recall it, we had a deed buying him out."

This, in my opinion, substantiates Mr. Buck's testimony that at the time he had given the quit

Defendant's Exhibit No. 26—(Continued)
claim deed after receiving \$25.00 for same that Mr. Mouat had stated that he was through.

In response to further questioning, Mr. Buck testified that they had dug up between 20 and 30 pieces of chromite ore from the discovery hole about the size of Exhibit "E", which is about the size of a man's fist.

Mr. High Nicely testified he had been employed at the Mouat [346] Mine since April, 1942, first as Mine Foreman at the mine until January, 1944, then as engineer for the Reconstruction Finance Corporation, and afterwards as maintenance engineer for the War Assets Administration. The buildings on the properties were all placed prior to the second amended application and the effect of the second amended application was to encompass all the buildings on the properties. He had not observed any mining operations on the Lake Placer, exclusive of the tunnels which go into the other Lode Claims, nor had he seen any signs or evidence of previous mineral development. In putting the houses and buildings on the Lake Placer claim, the whole camp was a checkerboard of sewer and water lines. Excavations for those lines were about 5 feet deep and nowhere in these excavations had he seen anything, which, based on his experience as a mining engineer, he would consider a valuable discovery. It was his personal opinion that a prudent man would not be justified in spending time and money

Defendant's Exhibit No. 26—(Continued)
and effort in the hope of developing a paying mine of it.

Mr. Strasburger testified to making two visits to the claim, the first about three weeks ago and the second the Saturday and Sunday previous to the hearing. He had gone over the claim and taken samples of ore and had assays made, which were placed on the records as exhibits and identified. Mr. Strasburger did not give an opinion as to whether a prudent man would be justified in spending time and money and effort in [347] the hope of developing a paying mine of it.

Mr. Malcolm W. Mouat testified that he had been a prospector for 50 years and had lived near the Lake Placer for 30 years. He had taken many samples himself from the Lake Placer which would run 28 percent magnesia, in addition to chrome and other minerals. He had been present when Mr. Strasburger had taken his samples. Mr. Mouat stated there are millions on tons of ore on the Lake Placer and other claims containing chrome, olivine, nickel and copper, and dwelt at great length on the amounts and values of these minerals. He states he could operate the Lake Placer by hydraulic pressure from the nearby streams at a cost low enough to make it profitable, mainly in the production of magnesium and the manufacture of fertilizers. He told of his activities in the region, and of losing \$90,000 in prospecting and developing his claims.

Mr. Dahle testified to being a Specialist most in

Defendant's Exhibit No. 26—(Continued)

milling and construction of millings and construction plants, quartz lode minings, and general mining. He visited and examined the Lake Placer for four or five days, November, 1946, in the company of Mr. Mouat. He had taken two samples of magnesium bearing rock and sent them to the assayers, Mr. Mouat had told him to send them to, but did not know what had become of them. In the course of 30 years, he had examined at least 2,000 claims. At the conclusion of his testimony, Mr. Dahle was asked the following question by Mr. Maury: (See Page 211) [348]

Q. "Taking all of the factors that you found present there into consideration, what have you to say as to whether that deposit of magnesium bearing rock, which you saw, is such as would justify a reasonable man in the expenditure of money with the expectation of making a commercially valuable and profitable property."

A. "I am not sufficiently up on chemical formulas for this sort of work, therefore, I feel that I cannot intelligently answer it."

Mrs. May Paul Mouat testified to being trustee for the locators of the claim, but in matters pertaining to the claim she had left everything to Mr. Mouat.

Mr. Gilles testified that he had never visited the Lake Placer claim but had read very extensively of the ores to be found in the Beartooth region. His testimony consisted mainly in describing the values

Defendant's Exhibit No. 26—(Continued)
of the factors needed in the production of magnesium and fertilizers.

The records show that the second amended location was made April 17, 1946 by Mrs. May Paula Mouat, acting as trustee for the original locators. Exhibits by the Government counsel show that the original locators quit-claimed all their interests in the claim between the dates October 31, 1941 to April 2, 1942.

The brief submitted by defendants is mostly a repetition of much of the evidence and assertion of the rights of the [349] locators to make the second amended location.

The brief submitted by counsel for the Government is a rebuttal of the arguments contained in the brief submitted by defendants and that they had no right to make the second amended location in the name of the original locators.

After hearing and reviewing the testimony in this case, I have come to the following findings and conclusions:

There is some conflict as to the location of the discovery cut. At the place where Mr. Koch made his excavation, he did not find any minerals, but according to Mr. Strasburger's testimony, it was very close to the discovery cut from which Mr. Buck testified he had dug up between 20 and 30 pieces of ore, some about the size of a man's fist, Exhibit "E". I weighed this exhibit and it weighed about 2 lbs. 4 oz., so that the amount of ore found

Defendant's Exhibit No. 26—(Continued)

by Mr. Buck would not amount to more than 50 pounds. This seems an infinitesimal amount for the size of the cut and the amount of labor expended in getting it out.

There is no conclusive evidence of the depth and amount of the wash or the amount and values of the ores in the wash which would be involved in the Placer operations.

Mr. Mouat has held a large number of lode claims in the vicinity of the Lake Placer for 30 years or more, so that it would seem as if he considered the lode claims richer and more valuable than the Lake Placer which was not located until 1940. [350] It was not found profitable to operate these claims, in competition with other and more richer sources of chrome.

It was only after the regular supplies of chrome were cut off that the Government found it necessary to get chrome from the Mouat and Benbow mines, regardless of cost. The Government expended a vast amount of money in the development of the mines and mills and houses for workers built on the Lake Placer location and all built before the second amended location. We would all have liked to see the Government continue the operation of the mines. However, just as soon as the supply of other chrome was restored, the Mouat mines were closed down and have remained closed down. In the course of the milling process, the chromite mineral was removed and so called tailings, which were discarded,

Defendant's Exhibit No. 26—(Continued)
contained olivine and serpentine, which could have been used for the production of magnesium. Here the Government threw away a product which was mined and milled at no cost from the standpoint of the magnesium because the chromite was paying for the millings and obtained magnesium from other plants they had built for the production of magnesium. Then there was a much better demand for magnesium than there is today or will be under ordinary peace conditions. Since the war ended, all of the large government plants for the production of magnesium have closed down as well as many private plants.

The piece of magnesium metal shown as Exhibit "D" was not made from any mineral from the Lake Placer region. [351]

As a result of the shutdown of the mines, the Government was left with a large townsite of many fine homes which had been erected at great cost, as well as mining equipment, mills, and large dumps of ore. The buildings and equipment which the Government has been able to dispose of have been transported elsewhere.

From the evidence submitted, it is my opinion that Mrs. May Paula Mouat was without authority to act as trustee for the original locators in making the second amended location as they had quit-claimed all their interest between the dates of October 31, 1941 and April 2, 1942.

Defendant's Exhibit No. 26—(Continued)

On the question of "Whether discovery was such as would justify a prudent man in spending time, money and effort on the Lake Placer claim in the hope of developing a paying property," Mr. Mouat contended it was, Mr. Strasburger did not give any opinion, Mr. Gilles had not examined the claim, Mr. Dahle stated he was not sufficiently up on chemical formulas for this sort of work to intelligently answer, and Mr. Koch and Mr. Nicely stated it was not.

The preponderance of opinion among the expert mining men and engineers in this case is "that a prudent man would not be justified in spending time, money and effort in the hope of developing a paying mine, and I so decide.

Acting Manager

/s/ WILLIAM RIDDELL,

Acting Manager

District Land Office

Billings, Montana

November 5, 1947. [352]

In the matter of a request October 2 by defendants to submit additional evidence which they could not have knowledge of previously, and before decision was reached on the original evidence, I have treated this as a request of rehearing. The evidence submitted is merely cumulative and asserts that Mr. Koch did not go deep enough in the excavation he made and that he would have to go to a depth of

Defendant's Exhibit No. 26—(Continued)
16 feet before he would have got any discovery. There is no proof that if the cut had been dug to 16 feet, ore would have been discovered, or if it had, that it would be more valuable than that in the discovery cut claimed by defendants, or of any of the samples taken from the claim and exhibited by defendants. The request for rehearing is therefore denied.

/s/ WILLIAM RIDDELL,
Acting Manager,
District Land Office,
Billings, Montana.
November 5, 1947.

I hereby certify that the above and foregoing is a true, correct, and complete copy of the decision rendered by me, as Acting Manager of the United States District Land Office, Billings, Montana, on November 5, 1947.

/s/ WILLIAM RIDDELL,
William Riddell,
Acting Manager.
November 12, 1947. [353]

ARTHUR A. JOHNSON

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lamb:

Q. Your name is Arthur A. Johnson?

A. That is right.

(Testimony of Arthur A. Johnson.)

Q. And you are Administrative Assistant of the Office of the United States Forest Service, Custer National Forest, under the Department of Agriculture, is that correct? A. Yes, sir.

Q. And as such do you have official custody and control of the records of the, as pertain to the Custer National Forest and under the United States Forest Service? A. Yes, in this office.

Q. I will show you an instrument marked Defendant's Exhibit No. 27 and ask you if this is one of the records maintained in your office of which you have official custody? A. It is.

Mr. Lamb: At this time we will offer in evidence Defendant's Exhibit No. 27. And for the information of the court it is a Special Use Permit granted by the Forest Service for this same townsite, and I feel that it is about on the same basis as this previous exhibit that is introduced.

Mr. Maury: We object to the introduction of this [354] instrument as being an attempt by the lessee and its legal successor to impeach the title of the landlord under the lease which has not been put in issue, and also that it is a well known fact or law rather that this forest reservation when erected reserved to all persons who wanted to enter that reservation for the purpose of mining and milling and location of mining claims a right to do so; that that is in all forest reservation enactments, and in the papers erecting the forest reservations in Montana, and that this special use permit is too indefi-

(Testimony of Arthur A. Johnson.)

nite to be held to apply to this particular placer location, and that this is one of the things that the lessee promised to sustain.

The Court: What does this purport to do?

Mr. Maury: It purports to give to the Defense Plant Corporation the right to use National Forest Lands in Sections 20 and 21, T. 5 S., R. 15 E. for the construction and maintenance of the following improvements, occupancy and development for the following purpose, subject to the conditions stated below, and then there is vast data of the land described by section, township and range.

The Court: Covers several hundred acres, is that it?

Mr. Maury: I presume so, Your Honor. I suppose it covers more than several hundred acres but I don't know without checking it. [355]

The Court: What is the purpose of it? What is your idea about this exhibit?

Mr. Lamb: This here is about on the same basis as this previous one.

The Court: Well let's dispose of it by receiving it subject to the same objection because they both go together.

Mr. Maury: We except.

Mr. L

(Whereupon said Defendant's Exhibit No. 27, Special Use Permit, offered and received in evidence, is a part of this record, and is in words and figures as follows, to-wit:)

DEFENDANT'S EXHIBIT No. 27

U

USES—Custer

Defense Plant Corporation

Mining Development (Mouat Properties)

2/16/42

SPECIAL USES PERMIT

Permission is hereby granted to the Defense Plant Corporation, a Federal Government Corporation, of Washington, D. C., to use National Forest lands in Sections 20 and 21, T. 5 S., R. 15 E., for the construction and maintenance of the following improvements, or occupancy and development for the following purposes, subject to the conditions stated below:

1. Tunnel site area, including ore bins, crushing plant, tram terminal and other works or structures necessary in connection with the construction or maintenance of the same; said structures to be located upon an area of from five to ten acres near the center of the NW Quarter of Unsurveyed Sec. 20, T. 5 S., R. 15 E., upon land now included in unpatented mining claims and upon about one acre of what now appears to be unclaimed National Forest land;

2. Mine yard, including shops, supplementary buildings and structures, road connections, etc., as may be necessary or desirable for the best lay-out and development of the mine yard; said mine yard

Defendant's Exhibit No. 27—(Continued)

and supplementary structures to be located on an area of up to 11 acres located mostly in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of unsurveyed Section 20, T. 5 S., R. 15 E., upon land now included in unpatented mining claims and upon about nine acres which now [357] appears to be unclaimed National Forest land;

3. Mine campsite, including all necessary structures, of a permanent or temporary character, for housing employees, mess facilities, shops, recreation room infirmary, warehouses, offices, water system, garbage and sewage disposal systems, light, power and telephone distribution systems, streets or paths, road connections, and other structures or facilities necessary for the development of the area as a mine campsite; said mine campsite to be located on an area of approximately 60 acres, located mostly in the NE $\frac{1}{4}$ of Sec. 20, T. 5 S., R. 15 E., upon lands now included in unpatented mining claims and upon about 20 acres which now appears to be unclaimed National Forest land;

4. Service landing area, including loading platforms, warehouses, supplementary buildings, road connections, and other facilities necessary for expediting and maintaining freight traffic to the mine campsite, mine yard and tunnel site area; said structures and facilities to be located on an area of approximately 10 acres mostly in the SW $\frac{1}{4}$ of Sec. 21, T. 5 S., R. 15 E., upon lands which are now included in unpatented mining claims and, depend-

Defendant's Exhibit No. 27—(Continued)

ing upon the final location selected for this service area, upon National Forest lands;

5. Mill site area, including an ore concentrating mill, tram terminal and facilities, crushing plant, ore conveyor, warehouses, shops, offices, garages, tailing disposal dumps, [358] stock piles, residences and housing facilities for men employed in connection with the mining, milling or trucking operations, and necessary or desirable subsidiary structures or facilities including roads and road connections, streets, paths, water system, garbage and sewage disposal systems, power, light, and telephone line distribution systems; said structures and facilities to be located in an area of approximately 100 acres (of which about 25 acres now appears to be unclaimed National Forest land) in the center of Section 21, T. 5 S., R. 15 E;

6. Aerial tramway, consisting of steel towers, cable and buckets, and including necessary terminal facilities at either end, extending a distance of approximately 6470 feet on a bearing of approximately N 81°30' W from a point on the mill site area at about the center of Section 21, T. 5 S., R. 15 E., to a point on the tunnel site area in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of unsurveyed Section 20, T. 5 S., R. 15 E., across lands now included in unpatented mining claims, and across approximately 250 feet of National Forest lands;

7. Other facilities necessary or desirable in connection with the mining development, not mentioned

Defendant's Exhibit No. 27—(Continued)
above and not included in other special use permits, such as pipe lines for water or air, signal systems, etc.;

Conditions under which this permit is issued:

1. This permit is issued free of charge in accordance with Regulation L-2-B. [359]

2. The permittee shall comply with the regulations of the Secretary of Agriculture governing the National Forests.

3. This permit is subject to all valid claims. It is issued with the understanding that the permittee has secured or will secure the consent of any person having valid claim to any of the lands authorized to be occupied hereunder. However, the permittee and the Forest Service hereby mutually agree that if any unpatented mining claim covering lands authorized to be occupied by this permit is, in due course of law or regulation, declared or proven to be not valid when the occupancy or use authorized by this permit shall automatically have full force and effect as though the land had not been covered by the unpatented mining claim at the time of issuance of this permit.

4. The permittee shall fully repair all damage, other than ordinary wear and tear, to roads and trails in the National Forests caused by the permittee in the exercise of the privilege granted by this permit.

Defendant's Exhibit No. 27—(Continued)

5. Construction work (or occupancy and use) under this permit shall begin within 6 months, be completed within 2 years from the date of the permit, and this use shall be actually exercised at least 180 days each year, unless the time is extended or shortened.

6. In case of change of address, permittee shall immediately notify the Forest Supervisor.

7. No National Forest timber may be cut or destroyed [360] without first obtaining a permit from the Forest Ranger, except as hereinafter provided, and except as provision for removal of National Forest timber may be incorporated in sale permits or administrative use permits heretofore or hereafter issued to the permittee.

8. This permit may be transferred with the approval of the officer by whom it was given or his successor, subject to such conditions as may be imposed at the time of transfer. It shall terminate upon breach of any of the conditions herein or at the discretion of the Regional Forester or the Forester.

9. The permittee shall provide, whenever requested by the Forest officers, a way across the land covered by this permit for the free ingress or egress of Forest Officers and for users of National Forest land.

Defendant's Exhibit No. 27—(Continued)

10. The permittee shall require its operating agent or agents and all contractors or subcontractors to agree to pay the United States for any damage to property under the direct jurisdiction of the United States Department of Agriculture Forest Service resulting from this use.

11. Debris resulting from clearing operations in connection with preparatory work, construction or maintenance of any of the structures or facilities authorized herein will be disposed of in accordance with directions from the Forest Ranger; provided that no burning will be done during periods of high fire danger, or during the closed season, without written permission from him. [361]

12. The permittee agrees to observe and comply with all State laws and county ordinances concerning sanitation and the protection of health which are effective within the area covered by this permit; to adopt all necessary precautions to prevent pollution of the waters of streams or springs; to construct any outside toilets which become necessary in approved fly-proof manner and to maintain them in good sanitary condition; and to burn, bury, or otherwise adequately dispose of all garbage, refuse, debris, cans, etc., resulting from this occupancy of the land. The permittee further agrees to drain and clean septic tanks at periodic intervals, and, if requested to do so by the Forest Supervisor, on the advice of either the State Board of Health or

Defendant's Exhibit No. 27—(Continued)

a qualified engineer of the Forest Service, to construct and maintain satisfactory filter lines for disposal fields below any septic tanks or make other reasonable and justified additions or improvements to the sewage disposal systems. If a nuisance develops because of the method of disposing of tailings from the mill, either from the pollution of waters or adverse effect upon the health or livelihood of persons resident down-stream from the mill within a reasonable distance, and not to exceed 25 miles, the permittee agrees to adopt such precautions or make such changes in the method of disposing of tailings as may be recommended by competent authority and requested by either the Forest Supervisor or the State Board of Health. [362]

13. The permittee agrees to keep the premises in a neat and orderly condition (particularly with respect to the camp area) and to maintain structures and facilities in a safe condition.

14. No water rights accrue under this permit.

15. It is hereby mutually agreed between the permittee and the Forest Service that the permittee may make such provision as seems desirable and expedient, by contract, sub-contract, or other means, for the furnishing of meals, for supplying commissary facilities, for supplying laundry and janitor service, for selling articles of food, clothing, gasoline, oil, and other consumer goods necessary or desirable for providing residents of the various

Defendant's Exhibit No. 27—(Continued)

areas authorized to be occupied with necessities or conveniences of life; and such use of the National Forest lands involved will not be considered a "commercial" use as that term is construed in the interpretation of the Forest Service special use regulations; provided: no alcoholic beverages, including beer, will be sold on the premises; provided further: the permittee will own, or control through appropriate contract, the building or buildings where the furnishing of such services or the selling of such articles takes place; and the permittee will itself be responsible for determining the kind or type of goods or services to be sold or furnished under the provisions of this clause, and will be responsible for the manner in which any business operating under the provisions of this clause is conducted. The Forest Service reserves the right to protest [363] any rates charged for services rendered or goods sold which appear too high in comparison with competitive rates prevailing for comparable goods or services sold at other places plus an allowance for the cost of transportation to the place where such goods or services are disposed of; and in the event of persistently flagrant violations of this price policy to withdraw its recognition of the mutual agreement contained in this clause with respect to the article or articles subject to such persistent violation.

16. The permittee agrees to furnish the Forest Supervisor with general lay-out plans of the tunnel site area, mine yard, mine campsite area, service

Defendant's Exhibit No. 27—(Continued)

landing area, mill site area, and for any other developments which have a bearing on National Forest administration, and also any maps prepared under its direction showing the location of patented or unpatented mining claims in the vicinity.

17. With respect to the mine campsite area, the permittee agrees to hold clearing to that which is necessary for placing or utilizing structures, or clearing rights-of-way for structures or facilities. The permittee further agrees to make provision in the lay-out plan for this area for all of the housing needs that can reasonably be anticipated; and if it will not be possible to provide permanent or semi-permanent structures, either bunkhouses or family dwellings, for all employees that will need to be housed on the mine camp area, to make satisfactory provision [364] for either temporary camping area or trailer camps to take care of the excess. Any such temporary camps or trailer camps will be located only on the mine camp area (except with the prior approval of the Forest Ranger) and will be under the control and supervision of the permittee. The permittee hereby agrees to assume responsibility for seeing that the following minimum conditions are met in the lay-out and occupancy of any such temporary camping or trailer camp areas:

(a) the entire area has an adequate supply of pure water;

(b) the camp lay-out is planned and streets are cleared before any occupants move onto the area;

Defendant's Exhibit No. 27—(Continued)

(c) living quarters are at least 100 feet from running water and are not crowded together;

(d) the occupants make adequate provision for fly-proof toilets and garbage pits located at a safe distance from a sanitary point of view and not less than 100 feet from running water and 50 feet from living quarters.

The permittee agrees to accept responsibility for general supervision over such temporary camps, to see that the minimum requirements are adhered to, and to see that upon abandonment of the temporary camp all structures are removed and the area cleaned up to the satisfaction of the Forest Supervisor. The Forest Service assumes no responsibility for any such temporary camps after they are established except for such occasional [365] inspections as may prove desirable for the purpose of seeing that the minimum requirements are being met.

18. The permittee hereby agrees to accept responsibility for making satisfactory arrangements for housing of its own employees, and for supervision over housing facilities and conditions of its contractors, employees of contractors, and employees of other Governmental agencies which may be requested or required to do work in the vicinity in connection with the mining development.

19. The permittee agrees that any dams constructed by it on the permit area will be subject to inspection by a competent Forest Service engineer with regard to safety features, including adequacy

Defendant's Exhibit No. 27—(Continued)

and design of spillways, adequacy and design of outlet structures, footings and method of abutting dam in side embankments; and the Forest Supervisor may require the permittee to submit plans showing such details of design before a dam is constructed.

20. The permittee agrees that to the extent it is economically practical to do so, all timber cut in the clearing of rights-of-way for the various structures and facilities authorized herein which can be used for mine timbers or other uses in connection with mining operations of the permittee on the so-called "Mouat Properties" will be skidded to a convenient decking point and decked there. The Forest Service agrees that any such decks of National Forest timber will be held for use as [366] mine timbers or other uses by the permittee as long as the permittee has a need for it, the disposal of such timber to the permittee to be in accordance with terms of any timber sale or administrative use agreements then in effect with the permittee.

21. The permittee shall clear and keep clear of all inflammable material whatever width of right-of-way is necessary for the operation of the tramway, but not to exceed 50 feet. The Forest Ranger shall be responsible for determining the adequacy of the clearing at any time with respect to fire control or the abatement of fire hazards.

22. The permittee agrees that the Forest Service may, free of charge, transport material over the

Defendant's Exhibit No. 27—(Continued)

tramway when such use by the Forest Service will not interfere with the mining operations of the permittee.

23. The permittee agrees, with respect to the tramway, to remove the cable, the tram buckets, and the towers, but not the tower foundations, at the termination of this permit or upon the abandonment of this use; provided that if this permit is terminated because of transfer of the use to some other agency or individual for the express purpose of continuing the use of the National Forest lands herein described for the purpose of which this permit is issued, then this clause shall not apply to the permittee named herein.

24. The permittee agrees that in the interest of good [367] administration, preserving order, and avoiding difficulties which might otherwise develop it will make the necessary arrangements to have a deputy sheriff available at or in the vicinity of its Mouat operations for the duration of this permit, or at least during the time that it is actively engaged in operations on the Mouat properties.

25. The permittee agrees that any conflict in area or terms between this permit and the provisions of three other special use permits which may hereafter be issued to other permittees for the construction and maintenance of a road, power distribution line and telephone line will be settled amicably between the permittee and such other permittee as

Defendant's Exhibit No. 27—(Continued)

may, by contract or other directive from the permittee, be requested or required to construct and/or maintain said road, power distribution line or telephone line. The Forest Service agrees not to object to overlapping in the use made of areas authorized to be occupied under the several permits provided that such overlapping occurs with the knowledge and consent of the permittee.

26. The Forest Supervisor may require marking on the ground the boundaries of the various "sites" herein authorized to be occupied.

27. The area herein authorized to be occupied in the various "sites" may be modified or extended according to the needs for the proper development of the mining properties; [368] provided, the permittee will seek the prior approval of the Forest Supervisor before making any substantial change in area or proposed use.

28. This permit may be amended or modified by a modification in letter form, which, after acceptance by the permittee and approval by the issuing officer, his designated representative, or successor, will be attached hereto and become a part hereof.

29. The permittee shall do everything reasonably within its power and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon request of officers of the

Defendant's Exhibit No. 27—(Continued)

Forest Service, or other agents of the United States, to prevent and suppress fires on or near the lands to be occupied under this permit.

30. In the interest of fire protection in the vicinity of the project works, the permittee hereby agrees to negotiate a cooperative fire protection agreement with the Forest Service, the agreement to be prepared by the Forest Service and to include applicable parts of the usual cooperative fire protection agreements, such as use of employees of the permittee for fire fighting purposes, their release, rates of pay, and responsibility of the permittee and the Forest Service in fighting forest fires in the vicinity of the property under the control of the permittee.

31. It is expressly understood that when the Metals Reserve [369] Company takes over the interest of the Federal Government in the development and/or operation of the chromium mining operations on the so-called Mouat properties in the Stillwater River drainage in Stillwater and Sweetgrass Counties, for which the Defense Plant Corporation is now responsible, the term "permittee" as used herein shall be construed to mean Metals Reserve Company instead of Defense Plant Corporation; and the obligations assumed hereunder by the permittee and by the Forest Service shall remain the same as if the permit had originally been issued to the Metals Reserve Company. But

Defendant's Exhibit No.. 27—(Continued)

this construction of the word "permittee" shall apply only to the Metals Reserve Comany; and the transfer of right, title, or interest in or to the structures or facilities for which this permit is issued to any other person, organization, or thing shall terminate this permit.

32. It is hereby mutually agreed that upon the termination of this permit, or upon the decision of the permittee to discontinue its interest in the mining operations referred to in Clause 31, the Forest Service and the permittee will confer upon the most satisfactory methods of disposing of the structures and facilities built upon the lands authorized to be occupied by this permit. If at that time the mining venture is to be continued by a person or organization other than the permittee, the Forest Service agrees that any such person or organization designated by the permittee shall receive first [370] consideration in the issuing of new special use permits covering the structures and facilities included in this permit, or other structures and facilities existing at that time but covered by separate special use permits the use or enjoyment of which is essential to the prosecution of the mining work. If no such further work is contemplated, the permittee and the Forest Service will decide upon a course of action to be followed, subject to any Acts of Congress or other statements of public policy regarding the disposition of property held by the permittee; and such course of action may provide that the

Defendant's Exhibit No. 27—(Continued)

permittee leave intact all, part or none of the structures or facilities herein above referred to and completely remove others, the decision as to which structures or facilities are to be left intact and which removed to be based on the effect of such action on the public welfare and the extent to which any structures or facilities left in place may be utilized in the future for some worthwhile or useful purpose.

33. In no event shall the United States Department of Agriculture Forest Service be held liable for damages occasioned to the property of others by the construction, maintenance or operation of the structures or facilities herein authorized, or any which may subsequently be authorized.

34. In the discretion of the Forest Supervisor, this permit may be considered a temporary permit, to be superseded in due course by another special use permit containing substantially [371] the same conditions but including more specific descriptions of the National Forest land to be occupied for the various uses herein authorized.

35. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, and either before or after he has qualified, and during his continuance in office, shall be admitted to any share or part of this agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend

Defendant's Exhibit No. 27—(Continued)
to any incorporated company where such agreement
is made for the general benefit of such incorpora-
tion or company (41 U.S.C., Sec. 22 and 18 U.S.C.,
Sec. 199). [372]

Recommended For Acceptance

Date: Apr. 18, 1942

ANACONDA COPPER
MINING COMPANY

By F. C. GAETHKE

Manager Chrome Operations

Accepted

Date: Apr. 18, 1942

DEFENSE PLANT
CORPORATION

By CECIL B. HILL

Supervising Engineer

Approved

Date: Apr. 21, 1942

W. J. LESSICK
Forest Supervisor

Accepted in transfer or assignment of interest
from the Defense Plant Corporation subject to all
the conditions set out above.

Date

METALS RESERVE
COMPANY

By

Title [373]

Mr. Lamb: The defense rests, your Honor.

REBUTTAL

Mr. Maury: Mrs. Mouat, take the stand.

MRS. MAY PAULA MOUAT

resumed the stand on rebuttal and testified as follows:

Direct Examination

By Mr. Maury:

Q. Mrs. Mouat, in the matter of this lease of December, 1941, did you have any conversations with Mr. John Norton about any buildings that were to be on the leased land or might be put on it?

A. No, sir.

Q. Did you have any conversations with Mr. Hutchinson about any buildings that might be put upon the land?

A. No, sir.

Q. Where was that lease signed by you? Where were you when you signed that lease?

A. At the house.

Q. Who were your attorneys in the matter?

A. Myers and Judge Goddard.

Q. That was ex-Senator Henry L. Myers?

A. Yes. [374]

Q. And Judge Goddard?

A. Yes.

Q. And did you trust to them about the lease?

A. Yes, I certainly did.

Q. And both of them are now dead?

A. Yes.

(Testimony of Mrs. May Paula Mouat.)

Q. Were you in bed on the forenoon of the day that lease was signed?

A. Until eleven o'clock.

Q. Until eleven o'clock, and why?

A. Well I had arthritis very bad and my husband came home at eleven and said I would have to get up and get lunch for those that were coming up.

Q. And they arrived? A. Yes, sir.

Q. A short time after that? A. Yes.

Q. And now what were you doing when they arrived?

A. Well rushing around getting the lunch.

Q. The circumstances connected with signing the lease, what were they? You can tell them in your own way.

A. Well they rushed me into the living room and didn't give me a chance to read the lease or anything. Mr. Hutchinson sat on one side of me and Mr. Mouat on the other, and they tried to read it to me because they were in a hurry they had [375] to try to get to Columbus or over to the Benbow, and then instead of hurrying after the lease was signed why they relaxed, they had lots of time.

Q. Did either of those gentlemen say anything to you there about any buildings that might be put on the land? A. No, sir.

Q. Or anything in that connection?

A. No, sir.

Mr. Maury: That is all.

(Testimony of Mrs. May Paula Mouat.)

Cross-Examination

By Mr McKevitt:

Q. Mrs. Mouat, you originally signed a first lease in June, 1941?

Mr. Maury: We object as not proper cross-examination.

The Court: Sustain the objection.

Q. (By Mr. McKevitt): I will refer you to Plaintiff's Exhibit No. 25 and ask you if you originally signed this?

Mr. Maury: Objected to as too remote and not proper cross-examination.

The Court: No, I don't think so unless you want to take this witness and make her your own. I will sustain the objection. [376]

Q. (By Mr. McKevitt): Mrs. Mouat, you were represented by attorneys at all times in this negotiation, weren't you?

A. Yes, sir, Senator Myers.

Q. You are the Trustee of an agreement whereby these mining claims have been transferred to you as Trustee?

Mr. Maury: Objected to as not proper rebuttal and testimony has been gone into.

Mr. McKevitt: It is perfectly proper; you are trying to show her interest.

The Court: What is the question?

Mr. McKevitt: I simply asked if she was a Trustee of the various mining claims located by Mr. Mouat and transferred to her as Trustee.

(Testimony of Mrs. May Paula Mouat.)

The Court: We have gone over that and that is in evidence.

Q. (By Mr. McKevitt): Did you yourself have anything to do with the negotiations, Mrs. Mouat?

A. No, I was sick in bed most of the time.

Q. The negotiations leading up to the transfer to you as Trustee?

Mr. Maury: We object as not proper rebuttal and has been gone into.

The Court: Sustain the objection.[377]

Q. As a matter of fact isn't this true, you read this instrument?

The Court: I will sustain the objection because the witness already stated she had her attorneys and she relied upon her attorneys for advice.

Q. Did you also rely upon your husband?

Mr. Maury: We object to it as calling for communication between husband and wife.

The Court: I will sustain the objection.

Mr. McKevitt: That is all.

Mr. Maury: That is all.

MALCOLM WILLIAM MOUAT

resumed the stand on rebuttal and testified as follows:

By Mr. Maury:

Q. Mr. Mouat, were you in court when Mr. John Norton testified? A. Yes, sir.

Q. Were you sitting up close where you could hear? A. Yes, sir.

Q. He said that there were certain conversations

(Testimony of Malcolm William Mouat.)

between you and himself prior to the signing of this lease about buildings that might be placed on the land; did any such conversation take place?

A. May I ask if it was the first or second lease?

Q. I am talking about the second lease, the one in December.

A. No conversations on that.

Q. Now was there any conversations between you and Mr. Hutchinson?

A. Not on buildings or houses or wooden structures.

Mr. Maury: That is all.

Cross-Examination

By Mr. Lamb:

Q. Mr. Mouat over how long a period of time did the negotiations go on before the actual lease was signed?

Mr. Maury: We object as not proper rebuttal, not proper cross-examination.

Mr. Lamb: Your Honor, he is asking whether or not there was any conversation with Mr. Norton and it relates to those conversations and merely preliminary question.

The Court: Well he said no. I suppose you could ask that question. Overrule the objection.

Q. How long did the negotiations continue before the lease was finally signed by you and Mrs. Mouat?

A. The second lease?

Q. How long did all of the negotiations go on?

A. Including the first lease? [379]

(Testimony of Malcolm William Mouat.)

Q. All the negotiations leading up to the final signing of the lease?

A. From roughly in May to the signing of that lease, I think December 17th. I can look in my notebook.

Q. No, that is approximate. And during that time did you have quite a number of different conversations with Mr. Norton pertaining to that lease?

The Court: Which lease?

Q. The lease which is signed, final lease?

A. Some letters transpired between us and later, that lease was signed this was later so I had no conversations. He was not out much.

Q. Did you have any conversations with Mr. Norton at any time between May and the actual signing of the lease?

A. First or second lease?

Q. Any conversation with Mr. Norton at any time between May and December?

A. Yes, we had conversations.

Q. All right, about how many?

Mr. Maury: We object as too remote and not proper rebuttal.

The Court: I think so. He said he had no conversations about the buildings. That is what he was interrogated about and you can ask him along that line, ask him in respect to that if you want. [380]

Mr. Lamb: That is all.

Mr. Maury: That is all. The plaintiffs rest.

Mr. Lamb: The defense rests, Your Honor.

Mr. Maury: If Your Honor please, I take it the court will want a copy of the record?

The Court: Yes.

Mr. Maury: And I take it that the court doesn't care for any oral argument and that it is better to have it all reduced to writing for the court to consider.

The Court: I think so. This is a complicated case here and a good many questions of law and we better have the testimony written up, and upon receipt of copies of the transcript how much time do you want for briefs?

Mr. Maury: Why we would want two weeks or less.

Mr. McKevitt: After the transcript——

Mr. Maury: After the transcript gets in our hands.

The Court: After receipt of the transcript.

Mr. Lamb: Your Honor, as far as the defendants are concerned our counsel is somewhat divided and will be assisting in writing of the brief and I think we will need a little more time than the usual thirty days.

The Court: Suppose you take thirty days on the side and if you hurry things up and get through before that [381] all well and good. If you take thirty days on the side and twenty days for reply, and if anything happens you think you require more time, apply to the court. There is a good deal of ground to cover.

Mr. Maury: Now as to expense we will stand half and the defendants half.

Mr. McKevitt: You mean as far as the transcript?

Mr. Maury: As far as the transcript, and that shall abide as costs of the case.

Mr. McKevitt: We will get into that later.

Mr. Maury: Now I want the court to suggest when the reporter gets to all these documents that have long certificates on them that when they are prepared, we especially said there was no objection to the certificates, you know, that they are true and correct, so that the reporter could just show in his notes duly certified so that there won't be any unmerciful encumbering of the record.

Mr. McKevitt: Your Honor, there is one other thing I notice the reporter was taking opening statements and ordinarily that isn't transcribed in the record.

Mr. Maury: No, he won't put in any of that.

The Court: No, it isn't necessary to put that in as part of the record, and there are a lot of exhibits he can refer to that will not be encumbered in the record. I can refer to those exhibits as long as they are kept together in [382] a separate box or package so they can be referred to.

Mr. Maury: We will get the record quicker that way. Your Honor, there is a rule we have to present findings within a certain time. We would like to present our findings within ten days after the record is given to us.

The Court: After the court's decision you present findings. The court in its discussion invites findings and conclusions.

Mr. Maury: Yes.

The Court: And I suppose the court can allow any time.

Mr. Maury: We would like ten days after the record is submitted to us.

The Court: Very well.

Mr. Maury: For the purpose of the record we ask at this time for the issuance of writ of restitution of the premises.

Mr. McKevitt: We oppose it, your Honor, because the Reconstruction Finance Corporation is being defendant here and the testimony definitely established anyone in possession, namely, the War Assets Administration, has already been dismissed as defendant in this suit.

The Court: Well we will have to see what we can do about it later on if we can do anything about it.

Mr. Maury: Yes. We were making our record.

The Court: I will adjourn court until tomorrow morning at 10:00 o'clock. [383]

In the District Court of the United States, in and
for the District of Montana, Billings Division

United States of America,
State of Montana—ss.

I, Sidney O. Smith, Official Court Reporter, in

the above-entitled court, do hereby certify that the foregoing annexed transcript is a true and correct record of the testimony and proceedings had in Civil Action No. 871, May Paula Mouat, et al., vs. Reconstruction Finance Corporation, et al.

Dated this 24th day of December, 1947.

/s/ SIDNEY O. SMITH,
Official Court Reporter.

[Endorsed]: Filed Dec. 24, 1947.

In the District Court of the United States, in and
for the District of Montana, Billings Division

Civil Action No. 871

MAY PAULA MOUAT and M. W. MOUAT, Wife
and Husband, and MAY PAULA MOUAT, as
Trustee of an Express Trust,

Plaintiffs,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION and WAR ASSETS ADMINISTRA-
TION, an Agency of the United States of
America,

Defendants.

OPINION

This is an action for damages, alleging the breach of a written lease on the part of the defendant, the lessee, for failure to pay rent to the plaintiffs, the lessors therein; for damages for holding over; for

rent for holding over, and for damages for strip and waste, and failure to leave the property in good condition as provided in the covenants contained in the lease. The case was tried to the court without a jury, the transcript of the evidence made available to court and counsel and briefs for the respective parties were subsequently filed, and the case thereafter submitted to the court for decision.

The lease is extended and somewhat complicated, but in that respect not unlike many other contracts prepared for the Government, or agencies thereof, during the prevalence of war conditions. The lessors had title to some of the property embraced in the lease and to other property apparently only a possessory claim, but the lease was duly executed and the lessee occupied the property under the terms of the lease and conducted mining operations thereon. Some of the important questions involved relate to the amount of rent claimed by lessors and likewise the measure of damages for the destruction and removal of buildings placed upon the ground by the lessee.

The lease was entered into between plaintiffs and the Metals Reserve Corporation, which the Government owned and created by the Reconstruction Finance Corporation, and it appears that under the Act of June 30, 1945, 59 Stat. 310, the latter corporation succeeded to all the rights and liabilities of the former corporation. Plaintiffs claim minimum royalties for the years 1944, 1945, and two months of 1946, amounting in all to \$21,666.66.

About eighty homes and other buildings were constructed on land known as the Lake Placer Mining Claim. The buildings were occupied for the most part by the miners. The defendant challenges the interest of the lessors in the Lake Placer Claim and the right to lease the land included therein, and asserts its right to remove all buildings from this claim at the expiration or termination of the lease. The defendant contends that the parties to the lease at all times agreed, that townsites, such as the Lake Placer Claim constituted, would not come within the class of improvements which would pass to the plaintiffs upon the termination of the lease. In that connection the question is raised whether the term "wooden buildings" contained in paragraph 15 of the lease would include the wooden structures on the Lake Placer Claim. Defendant claims an ambiguity exists in the lease in that respect and asks the court to accept oral explanation by which it is contended that the term "wooden buildings" did not apply to those on the Lake Placer Claim, and were not to become the property of lessors upon the termination of the lease, and could therefore be disposed of by lessees as they saw fit.

From a consideration of the lease, the pleadings, evidence and briefs, the court concludes that the plaintiffs are entitled to judgment for immediate possession. The plaintiffs claim a minimum royalty due them until February 28th, 1946, in the sum of \$21,666.66, and the proof on the part of lessee, or lack of proof as to the exact time when opera-

tions by the lessee actually terminated would seem to require the allowance of this claim, when considered in connection with other pertinent circumstances.

It appears that on November 15th, 1945, the plaintiffs were notified in writing that the lease would expire on February 28th, 1946, but on the subject of the adjustment of royalty payments it would seem necessary to determine definitely when operations under the contract ceased, and since the lessee was in possession and control the burden would fall upon the defendant to establish this [387] fact. Plaintiffs assert that there is no order in the record to the defendant from any board or officer requiring a shut-down of operations. The court has reconsidered the exhibits 7 to 21, and is unable to find sufficient evidence of an order from one in authority to the lessee or successor calling for a cessation of operations under the lease and fixing the time and circumstances when such an event would take place. Should payment of a minimum royalty be refused upon such an unsatisfactory showing of a closing or curtailment of production? Paragraphs 7 and 24 of the lease present no great problem in interpretation, and for any of the causes set forth therein it would seem that the lessee would be authorized to shut down operations during the existence thereof.

As it appears to the court the only evidence of an actual closing or ending of operations under the lease is found in the testimony of Mr. Nicely, who

was an officer in charge of operations; he was a witness for the defendant, upon whom the burden rested to show when production ceased; on page 24 of the record, in answer to an inquiry as to when he moved out of a certain house, he said: "I don't recall when it was."; he was further questioned as to whether this was after September 1st, 1946, and he replied: "No, it was before that. It was roughly about the time the operation ceased."; which would seem to indicate that the operation ceased before the first of September, 1946. This comes the nearest to a definite closing-down date that the court recalls from the evidence.

On the subject of possession, to the court it seems to have been conclusively established by the evidence that the plaintiffs have never been in possession of the demised property since the defendant took possession under the lease, and were not in possession at the time this cause was tried. It does not seem necessary to extend this decision by a discussion of the evidence appearing in the record on this subject. How long such refusal of possession can continue in violation of the terms of the lease, after the termination thereof by the defendant, without some recompense to the plaintiffs, would seem to present a serious question. The plaintiffs claim they are entitled to rent for holding over and [388] keeping them out of possession, and the defendant responds by asserting that no evidence has been presented upon which a rental value can be based. But the minimum royalty during con-

tinuance of the lease and production was fixed at \$10,000. If notice is given that the lease is to be terminated, to take effect on a date certain, and the lessee holds over and continues in possession, would not he be required to pay the lessor the same amount as a rental for failure to yield possession upon the termination of the lease according to the provisions thereof? Plaintiffs have cited some well reasoned cases which would seem to indicate that such a rule should be applied. Defendant's counsel endeavor to dispose of this issue by saying that the rental value should be established by proof, that the property had no rental value and was practically worthless upon the termination of the lease, and, therefore, as a pertinent corollary, the lessee might hold over for an indefinite period, and the lessors have no means of recovering any compensation for the manifestly illegal act of the lessee. If the property was practically worthless, as asserted by defendant, it is difficult to understand how that would afford any justification for withholding possession from the lessors in violation of the express terms of the lease. As it seems to the court, the minimum royalty should stand for rental against the defendant for not complying with the terms of the lease in delivery of possession after termination thereof, and the court will so decide this issue.

According to the terms of the lease it was agreed that the plaintiffs should deed defendant not to exceed 200 acres for townsite and other purposes

named on written request therefor; but somehow, either the request was not made, or if made, the deed was not forthcoming, and it is not exactly clear how it happened, but as it transpired the defendant took over the Lake Placer ground as a townsite, without objection from any source, so far as appears in the record, and nothing whatever was done about paragraph 22 which provided for a quit claim deed of all interest of plaintiffs in not to exceed 200 acres of ground. If plaintiffs had deeded any interest they have or thought they had to Lake Placer ground, would they have laid any claim to the "wooden buildings"? Under paragraph 15 the question answers itself. It seems to have been an oversight on the part of [389] some representative of defendant that a quit claim deed to townsite ground was not obtained from plaintiffs as the lease provided. In discussing this question relating to the "wooden buildings", one of the defendant's queries is, can the plaintiffs prevent the removal of buildings they do not own from land they never owned? But the governing provisions of the lease must be considered. Paragraph 15 of the lease provides that upon termination thereof by either party "Lessee shall surrender peaceably the leased premises and appurtenances in good order with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and that lessors shall have the right to re-enter upon said leased premises owned by them

and appurtenances and take full and complete possession of the whole thereof upon the expiration of this lease or the termination of this lease for any reason by either party. Lessee shall have six (6) months' additional time to remove from the leased premises its personal property, and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings erected upon the demised premises and ore on dumps upon which royalties have not been paid."

By giving effect to the context the wooden buildings mentioned here would seem to be specially associated with wooden mine structures, wooden tramway towers and ore on the dumps on the demised premises at the mine site. This part of the paragraph would seem to have special reference to the buildings and structures described at or around the mine. Could it apply to residences erected on a townsite by the lessee for occupancy by its employees; the language might be held to comprehend all wooden buildings on the demised premises, although it does not expressly so state; and when considered with paragraph 20, would seem to favor such interpretation, for it provides that "unless there is an understanding to the contrary in writing, anything remaining on the premises herein demised and leased upon the termination hereof, for a period of more than six months after such termination, shall conclusively be deemed to have

been abandoned by the lessee in favor of the lessors." But again it is provided in paragraph 22, that upon written request [390] therefor the lessors will by deed quit claim all lessors right, title and interest to property, not exceeding 200 acres, which is to be designated by lessee for use by lessee for townsite and other purposes. Plaintiffs assert that lessee never applied for a deed to such property under the lease. However, the buildings were erected upon the Lake Placer grounds without any question being raised or objection to use of such property for townsite purposes, and for which title was warranted by lessors in paragraph 31 of the lease, and to which defendant responds that plaintiffs did not have and have not now any title whatsoever.

It does not seem reasonable to assume in the absence of clear and unmistakable language to that effect that officers and Boards of the Government would undertake the expenditure of such large sums for homes of their employees on grounds used as a townsite, with the intention of making a present of such property to lessors upon the termination of the lease, and the language is by no means clear that such was their intention. The very fact that the contract provided for the conveyance of land by lessors for townsite and other purposes would seem to disclose the intent that any buildings erected thereon would become the property of lessees. From what has already been said a doubt might readily arise as to the exact meaning and application of the words "wooden buildings." On the one hand,

it might be said that only the wooden buildings at the mill site are to be included, while on the other, one might contend that all wooden buildings on the demised premises are to be included. Because of this apparent ambiguity the court is of the opinion that there would be no violation of the parol evidence rule to allow the testimony given on this subject to stand as explanatory of the meaning and application of this language, and which indicates it was not intended to embrace townsite buildings erected by the lessee for the housing of its employees, but related to the buildings at the mill site. This question is important, and the higher court may find a different solution, but in this court's view it was not the intention that the language to be construed would apply to the homes, or residences, on the Lake Placer Claim, and that they were not intended to become the property of the plaintiffs upon the termination of the [391] lease. It seems clearly established by the authorities cited that the royalty or rental payment for holding over cannot be trebled in this case against the Government or an agency thereof.

Court and counsel have been awaiting the outcome of an appeal from the Bureau of Land Management to the Secretary of the Interior relating to the adversary proceeding by the United States to cancel the Lake Placer Mining Claim. The District Land Office at Billings and, on appeal, the Bureau of Land Management, had previously decided the question in favor of the United States. Recently the Secretary affirmed the decision of the

Bureau of Land Management in holding that the second amended location of the Lake Placer Claim was invalid, but remanded the case to the Bureau on the original location "for further hearing upon the question whether the minerals on the claim, as described in the amended certificate of placer location, which was filed on June 16, 1941, constitute valuable mineral deposits, and for such action as may appear to be appropriate in the light of the information developed as a result of such hearing." In view of the court's attitude in respect to the Lake Placer Claim and the buildings thereon, it does not seem necessary to delay further, perhaps for several months, the decision in this case.

Having considered the pleadings, evidence, lease, and many of the statutes and authorities cited in the able briefs of counsel for the respective parties, in the opinion of the court the decision here should be for the plaintiffs in the matters heretofore indicated, together with immediate possession of the premises, if such possession has not already been given them since the trial of said cause; and for the defendant in regard to the ownership of the buildings on the Lake Placer Claim, and such is the order herein.

Findings and conclusions may be submitted accordingly. Costs go to the plaintiffs.

February 28, 1949.

/s/ CHARLES N. PRAY,

Judge.

[Endorsed]: Filed Feb. 28, 1949. [392]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO FILE A CERTIFIED DECISION OF THE SECRETARY OF THE INTERIOR

Counsel for respective parties were present in Court this day, Mr. H. L. Maury appearing for the plaintiff, and Mr. John B. Tansil, United States Attorney, appearing for defendant.

Thereupon Mr. Maury presented a motion for leave to file a certified copy of a certain decision of the Secretary of the Interior herein, and, there being no objection by counsel for defendant, Court ordered that leave be granted.

Entered in open Court March 3, 1949, at Great Falls, Montana.

H. H. WALKER,
Clerk. [394]

1-480

United States of America
Department of the Interior
Washington, D. C.

February 17, 1949.

Pursuant to Title 28, Paragraph 661, United States Code, I hereby certify that the annexed is a true copy of the original as it appears on the records and files of this Department.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[Seal]

C. C. DAVISON,
Acting Chief Clerk.

MGW [396]

United States Department of the Interior
Office of the Secretary
Washington
A-25527

January 27, 1949.

UNITED STATES

vs.

M. W. MOUAT, et al.

“N”

Billings 2120791

Adversary proceeding.

Affirmed in part and
remanded in part.

APPEAL FROM THE BUREAU OF LAND
MANAGEMENT

* * *

I.

This is an adversary proceeding which was instituted on behalf of the United States to cancel the

Lake Placer mining claim in sec. 20, T. 5 S., R. 15 E., P. M., Montana.

A hearing was held on June 24, 25, and 26, 1947, before the Acting Manager of the District Land Office at Billings, Montana. On November 5, 1947, the Acting Manager rendered a decision favorable to the United States. The defendants appeal to the Director of the Bureau of Land Management and, in a decision dated July 8, 1948, the Assistant Director of the Bureau of Land Management affirmed the decision previously rendered by the Acting Manager of the District Land Office. The defendants thereupon took an appeal to the head of the Department. A printed brief was submitted and an oral argument was made in support of this appeal.

The original Certificate of Location relating to the Lake Placer claim, comprising 160 acres, was filed with the clerk and recorder of Stillwater County, Montana, by Paul A. De Lannoy, Margaret De Lannoy, Susie C. Rohder, Charles L. Buck, E. A. Rowe, J. G. Link, H. E. Duba, and R. L. Duba on July 16, 1940. It referred to the claim as "being valuable for gold, serpentine and associated minerals."

On June 16, 1941, an Amended Certificate of Placer Location was filed by the original locators. This certificate made certain adjustments in the boundaries of the claim, and asserted [397] that

gold had been discovered on each 20-acre tract of the claim.

On April 17, 1946, a Second Amended Certificate of Lake Placer Mine Location was filed by M. W. Mouat, purporting to act as agent on behalf of the original locators. It made further changes in the boundaries of the claim, and stated that "this said Lake Placer is valuable for gold, serpentine and associated minerals."

II.

With regard to the second amended location, the Government alleged in its pleadings that:

"The purported second amended location of the claim is void and of no effect because made by persons who, at the time of such attempted amendment, had no right or title to the claim * * *."

In support of this allegation, the Government introduced at the hearing:

(a) A certified copy of a conveyance dated November 4, 1941, by which, among other things, P. A. de Lannoy, Margaret de Lannoy, and Susie C. Rohder quitclaimed to May Paula Mouat their interests in the Lake Placer mining claim;

(b) A certified copy of a conveyance dated October 30, 1941, by which, among other things, J. G. Link, H. E. Duba, and R. L. Duba quitclaimed to May Paula Mouat their interests in the Lake Placer mining claim;

(c) A certified copy of a conveyance dated October 30, 1941, by which, among other things, Charles L. Buck and E. A. Rowe quitclaimed to

May Paula Mouat their interests in the Lake Placer mining claim;

(d) A certified copy of a conveyance dated February 2, 1942, by which Charles L. Buck again quit-claimed his interest in the Lake Placer mining claim, this time to M. W. Mouat; and

(e) A testimony from Charles Buck to the effect that he was one of the original locators of the Lake Placer claim, that prior to the date of the second amended location he had conveyed his entire interest in the claim for a consideration of \$25, and that he had no recollection of having authorized [398] the use of his name in connection with the second amended location of the claim.

The Government's case on this point was not counterbalanced by any clear evidence on the part of the defendants showing that, notwithstanding the conveyances mentioned above, the persons named in the Second Amended Certificate of Lake Placer Mine Location actually were possessed of interests in the claim as of April 17, 1946, the date on which the certificate was executed and filed, and that they had authorized M. W. Mouat to act as their agent in executing and filing the certificate.

It perhaps should be noted in this connection that when the defendant May Paula Mouat was asked by defendants' counsel the leading question, "And you were a trustee for the various owners," she responded, "Yes, sir" (Tr. 169); and that the Government's witness Charles Buck indicated on cross-examination that, at the time of the exe-

cution of his quitclaim deed in favor of M. W. Mouat, he "understood" that he "would have an interest coming back" (Tr. 66), the nature of the "interest" and the time when it would be "coming back" not being specified. Fragmentary and vague evidence of this sort does not, however, have sufficient probative value to overcome the plain language in the quitclaim deeds indicating that the original locators had wholly divested themselves of their interests in the claim prior to the date of the execution and filing of the Second Amended Certificate of Lake Placer Mine Location by Mr. Mouat, purporting to act as their agent.

The preponderance of the evidence clearly supports a finding that the persons on whose behalf Mr. Mouat purported to act as agent in executing and filing the Second Amended Certificate of Lake Placer Mine Location did not have any interest in the claim at the time of the execution and filing of this certificate. [399]

Moreover, the evidence indicates (but with less than complete clarity) that at least a substantial portion of the land which the Second Amended Certificate of Lake Placer Mine Location sought to bring within the claim for the first time was already being devoted by a Government agency to a public use under proper authority.

Accordingly, the decision of the Assistant Director of the Bureau of Land Management should be affirmed in so far as it holds the second amended location of the Lake Placer claim to be invalid.

III.

With respect to that part of the Lake Placer claim which is based upon the original location and the first amended location, the Government's allegation of invalidity in its pleadings is based upon the contention that minerals have not been found within the limits of the claim "in sufficient quantities to constitute a valid discovery."

The establishment of a valid placer mining claim on public land is contingent upon the discovery of "valuable mineral deposits"¹ in a form other than a vein or lode.² In determining whether mineral deposits discovered on public land are "valuable," the test to be applied is whether they are "such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine."³

The evidence in this case shows that there are, within the limits of the Lake Placer claim under the Amended Certificate of Placer Location, great quantities of loose rocks containing olivine, serpentine, and pyroxene, and also some loose fragments of chromite.

In attempting to show that these minerals do not constitute [400] "valuable mineral deposits," as that phrase is used in the mining laws, the Government at the hearing elicited from its witness Walter H. Koch, a field examiner of the Bureau of Land

¹30 U.S.C., 1946 ed., sec. 22.

²30 U.S.C., 1946 ed., sec. 35.

³Cameron et al. v. United States, 252 U.S. 450, 459 (1920).

Management, the statement that the rocks on this claim, containing olivine, serpentine, and pyroxene, "didn't contain any valuable mineral" (Tr. 12); the view that "it has not been demonstrated that a market exists for this type of material" (Tr. 57), based on the circumstance that no use had been made by the Government during World War II, when the need for minerals was acute, of large quantities of crushed olivine and serpentine available in this area as a byproduct of the processing of chromite from lode claims in the vicinity; and the opinion that "the showings thereon (i.e., on the Lake Placer claim) would not justify a prudent man to invest further money and spend additional time in developing same" (Tr. 13). The Government also elicited from its witness Hugh G. Nicely, a mining engineer, a negative answer to the question whether "a prudent man would not be justified in spending time and money and effort on the Lake Placer mining claim in the hope of developing a paying mine on it" (Tr. 77); and the information that a Government-owned mill, which was operated for a time during World War II within the limits of this claim for the processing of chromite taken from lode claims in the vicinity of the Lake Placer claim, had been closed by the Government before the end of the war (this testimony was apparently adduced in order to furnish a basis for an inference that the chromite in this area is of such inferior quality or unfavorable location that the extraction of chromium from it was impracticable, even under the spur of wartime need).

The more persuasive items of the defendants' evidence concerning the value of the mineral deposits on the Lake Placer claims consisted of general information with respect to the usefulness of olivine as a refractory material and the marketing of olivine for that purpose in another part of the United States, and the development by the [401] Tennessee Valley Authority of a process for the fusing of olivine and rock phosphate in the production of fertilizer (there is a large phosphoria formation in the vicinity of the Lake Placer claim and its olivine). These data hint—although they do now show—that there is a reasonable prospect of developing a profitable operation out of the olivine (and perhaps the serpentine, an altered form of olivine) on the Lake Placer claim.

The material in the record pertaining to the value of the mineral deposits on the Lake Placer claim under the first amended location is indecisive. The conclusions expressed by the Government's witnesses on this issue are not buttressed by adequate factual data in the record showing clearly a lack of economic value in these minerals because of their nature, quality, quantity, or location, or because of other factors. Accordingly, the Government's evidence on this point lacks the degree of completeness which would warrant an unequivocal finding that the Government has established that the minerals on the claim do not constitute "valuable mineral deposits." Conversely, the defendants' evidence is insufficient to establish affirmatively that

the mineral deposits on the Lake Placer claim are "such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine" out of this particular claim.

Accordingly, it appears that this case, in so far as it relates to the validity of the claim based upon the original location and the first amended location, should be remanded to the Bureau of Land Management for a further hearing on the question whether the minerals on the claim constitute "valuable mineral deposits," as that phrase is used in the mining laws.

IV.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Assistant Director of the Bureau of Land Management is affirmed in so far as it holds the second amended location of the Lake Placer claim to be invalid, and the case is remanded to the Bureau of Land Management for a further hearing upon the question whether the minerals on the claim, as described in the Amended Certificate of Placer Locations which was filed on June 16, 1941, constitute valuable mineral deposits, and for such action as may appear to be appropriate in the light of the information developed as a result of such hearing.

/s/ MASTIN G. WHITE,
Solicitor.

[Endorsed]: Filed March 3, 1949. [403]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court has considered the proposed findings of fact and conclusions of law, and the proposed judgments, submitted by counsel for the respective parties, and the supporting briefs, in connection with the opinion heretofore filed in said cause, and now being duly advised and good cause appearing therefor, makes and submits herewith findings of fact, followed by conclusions of law and judgment in the above entitled action.

Findings of Fact

On December 20th, 1941, the plaintiffs, May Paula Mouat and M. W. Mouat, wife and husband, and May Paula Mouat as trustee, executed and delivered to Metals Reserve Company, a corporation organized under the laws of the United States, a certain lease, for valuable consideration, for the term of ten years from its date, upon all of the following described property in Stillwater County, Montana, to-wit:

“Those certain patented quartz lode mining claims situated in Twp. 5 South, Range 15 East, M.P.M., in Stillwater County, Montana, known and described as:

Bald Eagle—U. S. Lot No. 69D

Mountain View—U. S. Lot No. 63-A

Rough Rock—U. S. Lot No. 63-B

Also, all those certain unpatented quartz lode

mining claims situated in Twp. 5 South, Range 15 E., M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in [405] Stillwater County, Montana, in the records of said County, on the dates, and in the respective books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Adam	July 19, 1941	24 Misc.	207
Princetons	May 8, 1941	24 Misc.	122
Skunk	May 8, 1941	24 Misc.	128
Sampson	May 8, 1941	24 Misc.	126
Oldeo	May 8, 1941	24 Misc.	124
Link	July 19, 1941	24 Misc.	209
Pete	July 11, 1918	7 Misc.	122
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	288
Scully	July 11, 1918	7 Misc.	122
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	286
Denver	Oct. 7, 1918	7 Misc.	233
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	291
Old Lady	July 11, 1918	7 Misc.	114
Westlake	July 11, 1918	7 Misc.	116
Billie	Oct. 17, 1918	7 Misc.	242
Chas. F.	July 11, 1918	7 Misc.	118
(Amended Cert.)			
Old Lady	Oct. 17, 1941	24 Misc.	289
Chas. F.—Continued:			
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	287
Gap	July 31, 1941	24 Misc.	219
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	290
Jame	Oct. 3, 1941	24 Misc.	271
Soup	Oct. 3, 1941	24 Misc.	273
Pine	Oct. 2, 1919	8 Misc.	167

Also, all those certain unpatented quartz lode mining claims situated in Twp. 5 South, Range 15 East, M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Park County, Montana, in the records of the said County, on the dates, and in the respective books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Smelter	Sept. 23, 1887	Vol. 1 Quarts Locations	25
Smelter	June 8, 1889	Vol. 1 Quarts Locations	420

Also, that certain unpatented placer mining claim and that certain unpatented tunnel site situated in Twp. 5 So., Range 15 E., M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Stillwater County, Montana, in the records of the said county, on the dates, and in the respective books, and on the respective [406] pages, as follows:

Name	Date Cert. Recorded	Book	Page
Lake Placer	July 16, 1940	23 Misc.	400
(Amended Cert.)	June 16, 1941	24 Misc.	155
Monte Alto Tunnel and Tunnel Site	Aug. 13, 1918	7 Misc.	159

Also, all of the right, title and interest of said lessors now owned, or which may be hereafter acquired, in and to those certain unpatented quartz

lode mining claims situated in Twp. 5 South, Range 15 East, M.P.M., Stillwater County, Montana, the certificates of location of which were recorded in the office of the County Clerk and Recorder of said Stillwater County, Montana, in the records of said County, on the respective dates, and in the books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Mountain View Chrome Co. #1	Sept. 22, 1939	23 Misc.	43
Mountain View Chrome Co. #2	Aug. 31, 1940	23 Misc.	434

Also, all water and water rights, ditch and ditch rights, flumes, easements, rights-of-way, permits from United States Forest Service, buildings and improvements upon, or used, or for use, in connection with the above described premises.

II.

That by Act of Congress of date June 30, 1945, all of the rights under the said lease, and all of the obligations under the said lease of Metals Reserve Company, were transferred to defendant, Reconstruction Finance Corporation, and on said day Reconstruction Finance Corporation became the assignee of Metals Reserve Company's interest in said lease, and remained such thereafter.

III.

The said lease provided that beginning January 1, 1943, and thereafter during the term of this lease, lessee agrees to pay to, and deposit with, the Yellowstone Bank of Columbus, Montana, for the benefit of May Paula Mouat, as trustee, a minimum royalty of Ten Thousand (\$10,000) Dollars per year, payable quarterly on or before thirty days after the end of each calendar quarter, but if the total [407] royalties paid on ores mined equal or exceeded the minimum in any calendar year, such would comply with the minimum royalty obligations, and that a royalty payment in excess of Ten Thousand (\$10,000) Dollars in any year could not be credited to the payment of any royalty of a succeeding year, but earned royalty in any quarter might be applied to any other quarter of such royalty year.

IV.

The said lease also provided:

“Provided, however, should lessee’s construction or development or mining or milling operations, or any other operation hereunder be suspended because of any of the causes or reasons set forth in paragraph 24 hereof, lessee’s obligation to pay a minimum royalty, as aforesaid, shall be suspended during any and all periods where such causes or reasons exist, and the obligation to pay such minimum royalty shall be reduced in such proportion as the period of suspension of operations bears to the entire calendar year.”

V.

Paragraph 24 of the said lease is as follows:

“Anything in this lease contained to the contrary notwithstanding, any strike, lockout, difference with workmen, accident, fire, explosion, flood, earthquake, embargo, mobilization, war, foreign war, hostility, riot, requirement, regulation, restriction, or other act of any government or governments, whether legal or otherwise, acts of public enemies, the elements, force majeure, inability to secure, or delay in securing cars, labor, raw materials, fuel, or other supplies or material or electric power necessary for the operation of the leased premises or the operation of lessee’s facilities, failure of the ore supply or loss of the ore body in the said leased premises, or inability to secure sufficient ore of the grade required for concentrating from the said leased premises, unforeseen metallurgical or milling delays, delays or interruptions in transportation by rail, water or otherwise, damage to, or destruction of such mines or plants or other operating facilities and any other contingency, whether or not of the nature or character hereinbefore specifically enumerated, which is beyond the control of lessee, or which delays or interferes with the performance of this agreement, shall be considered sufficient justification for delay in such performance until such cause ceases to exist.”

VI.

The lease provided that it might be renewed for an additional ten years if the lessee gave notice in

writing thirty days prior to the expiration of the lease.

VII.

The defendant failed to introduce sufficient evidence at the trial to show that any act occurred sufficient to relieve the [408] defendant, or its predecessor, the Metals Reserve Company, from the duty to pay minimum royalty under paragraph 24, and the burden of proof as hereafter found in Conclusions of Law, is upon the defendant to show absolution by reason of any exception set out in paragraph 24 of the lease. Lessee agreed in the lease to carry on "its operations diligently."

VIII.

The lease provided that the lessee might terminate the same by giving a written notice to the lessors, and on November 15, 1945, the lessee notified the lessors in writing that the lease would be terminated, and that surrender, termination and cancellation would be effective February 28, 1946.

IX.

The said lease provided that upon termination, the lessee shall deliver to lessors a proper release or certificate of that fact, duly executed and acknowledged. The defendant has never delivered to lessors any such certificate. The failure to do so constitutes a cloud upon plaintiffs' title to the lands described in the lease, and in these findings described.

X.

The lease provided that upon the termination,

lessee should surrender peaceably the leased premises and appurtenances in good order with the maintenance of possessory claims and rights and permits fully met, and that lessors should have the right to re-enter upon the leased premises owned by them, and appurtenances, and take full and complete possession of the whole thereof. That the lessee has not surrendered the said premises, or any part thereof, to the lessors; that lessee, by show of force, and armed guards and servants in possession, has wrongfully withheld the possession of the said premises, and all thereof, from the plaintiffs, and this up to the conclusion of the evidence in this case, to-wit: November 14th, 1947.

XI.

Paragraph 15 of the lease provides that upon termination thereof by either party "Lessee shall surrender peaceably the leased premises and appurtenances in good order with all payments [409] and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and that lessors shall have the right to re-enter upon said leased premises owned by them and appurtenances and take full and complete possession of the whole thereof upon the expiration of this lease or the termination of this lease for any reason by either party. Lessee shall have six (6) months additional time to remove from the leased premises its personal property, and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timber-

ing, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings erected upon the demised premises and ore on dumps upon which royalties have not been paid." And the lease provided that time was of the essence of all of the grants, terms and covenants, stipulations and conditions expressed in the lease, and that such should run with the land.

XII.

That the Metals Reserve Company went into peaceable possession of all of the real property described in the lease at the day of its execution, and remained in peaceable and undisturbed possession until its duties and liabilities, and the said lease, were transferred to the Reconstruction Finance Corporation. That Reconstruction Finance Corporation, from the day of such transfer, remained in peaceable and undisturbed possession of all of the said property until February 28, 1946, the day when the plaintiffs were notified by said defendant that the lease would expire; that the possession of the defendant has in no wise been disturbed by any third party before, or on the last day of the introduction of evidence in this case, to-wit: November 14th, 1947.

XIII.

When the lease expired there had been built by the defendant, or its predecessor in interest, Metals Reserve Company, on the leased land, known and described as the Lake Placer claims and there were

still present on the land, 103 wooden buildings, on cement foundations, with wiring and plumbing, (which plumbing and wiring went partly through the walls and foundations), and oil storage tanks appurtenant and buried, and piping appurtenant; on the expiration of the lease, February 28th—March 1, 1946, all these immediately became the property of defendant.

XIV.

The amount equalling the minimum rental due and unpaid during the period the defendant has held wrongfully the premises from March 1st, 1946, until the trial, is Seventeen Thousand, Fifty-five and 44/100 (\$17,055.44) Dollars.

XV.

The lease provided:

“Promptly upon receipt of lessee’s written request, lessors will execute and deliver to lessee a quitclaim deed to all of the lessors’ right, title and interest in and to property not to exceed 200 acres, to be designated by lessee, for use by lessee, for millsites, townsites, stock piling, and tailings disposal.”

XVI.

No evidence was introduced that lessee ever made any written request that lessors execute or deliver to lessee any quitclaim deed to any interest in any property not to exceed 200 acres, or otherwise, or that plaintiffs ever refused to do so. But it was the intention of the parties that land would be furnished

by the lessor for the construction of townsites and it was further the intention of the parties that the "buildings" to be left on the premises after termination would include only ordinary wooden buildings such as tool houses, machine houses, etc., and other structures necessarily constructed in connection with mining operations. It was not the parties intention that buildings constructed as part of a townsite should be left on the premises upon termination of the lease.

XVII.

The lease provided: "It is mutually agreed that this lease is a Montana contract, and shall be interpreted and construed under, and by the laws of the State of Montana." [411]

XVIII.

That the reasonable rental value of the premises described in the lease agreement, during the period from March 1, 1946, to the conclusion of the trial, November 14, 1947, was, and is, the reasonable sum of Ten Thousand (\$10,000) Dollars per year.

XIX.

Defendant has failed to pay to the plaintiffs the sum of Ten Thousand (\$10,000) Dollars due as minimum royalty under the lease agreement for the year 1944, and which was due and payable on December 21, 1944.

Defendant has failed to pay to plaintiffs the sum of Ten Thousand (\$10,000) Dollars due as minimum royalty under the lease agreement for the year

1945, and which was due and payable on December 21, 1945.

Defendant has failed to pay to plaintiffs the sum of One Thousand, Six Hundred, Sixty-six and 66/100 (\$1,666.66) Dollars, due as minimum royalty under the lease agreement for the months of January and February, 1946, and which was due and payable on March 1, 1946.

Defendant has failed to pay to plaintiffs the sum of Ten Thousand (\$10,000) Dollars due, as the reasonable rental value of the premises described in the complaint, and payable on March 1, 1947.

Defendant has failed to pay to plaintiffs the sum of Seven Thousand, Fifty-five and 44/100 (\$7,055.44) Dollars due, as the reasonable rental value of the premises described in the complaint, and payable on November 14th, 1947, the date of the conclusion of the trial.

XX.

The court finds that it has jurisdiction of the parties hereto, and of the subject matter in controversy. [412]

Conclusions of Law

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I.

This Court has jurisdiction of the parties, plaintiffs and defendant, and of the subject matter in controversy.

II.

The plaintiffs are the owners of or have possessory claims to, and are entitled to immediate possession of, all of the land and property described in the complaint, and hereinbefore described in the Findings of Fact, except the Lake Placer claims, title to which is now awaiting the decision on appeal by the Secretary of the Interior.

III.

The plaintiffs are entitled to have and recover of and from the defendant, Reconstruction Finance Corporation, a corporation, the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six (6%) percent. per annum from December 21, 1944, until paid; the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six (6%) percent. per annum from December 21, 1945, until paid; the sum of One Thousand, Six Hundred Sixty-six and 66/100 (\$1,666.66) Dollars, together with interest thereon at the rate of six (6%) percent. per annum from March 1, 1946, until paid; the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six (6%) percent. per annum from March 1, 1947, until paid, and, the sum of Seven Thousand, Fifty-five and 44/100 (\$7,055.44) Dollars, together with interest thereon at the rate of six (6%) percent. per annum from November 14, 1947, until paid. [413]

IV.

Defendant Reconstruction Finance Corporation, a corporation, is the owner, and entitled to possession of all houses, buildings, or structures situated and being upon the Lake Placer Mining Claims.

V.

The plaintiffs shall have and recover their costs of suit.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 11, 1949. [414]

United States District Court for the District of
Montana, Billings Division

Civil Action No. 871

MAY PAULA MOUAT and M. W. MOUAT, wife
and husband, and MAY PAULA MOUAT as
Trustee of an express trust,

Plaintiffs,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, a corporation,

Defendant.

JUDGMENT

Be It Remembered, that this cause came on regularly for trial at Billings, before the Court, the Hon. Charles N. Pray, Judge Presiding, without a jury,

on November 12th, 13th and 14th, 1947. The plaintiffs were represented by Thomas C. Colton, Lowndes Maury and A. G. Shone, attorneys at law; the defendant was represented by Mr. Thomas L. McKevitt, Assistant United States Attorney General, Mr. William T. Lennon, Assistant General Counsel, War Assets Administration, Mr. John B. Tansil, United States District Attorney, and his assistant, Mr. Franklin A. Lamb. Witnesses were sworn and testified on the part of the respective parties. The cause was dismissed as to War Assets Administration, and proceeded only as to the defendant, Reconstruction Finance Corporation. At the conclusion of the testimony, the Court took the cause under advisement, and briefs were submitted by the respective parties. On the 28th of February, 1949, the Court made and filed its opinion, and pursuant to the said opinion, and in accord therewith,

It Is Hereby Adjudged and Decreed, that the plaintiffs are entitled to the immediate possession of all of the following described real property, as follows, to-wit:

Those certain patented quartz lode mining claims situated in Twp. Five (5) South, Range Fifteen (15) East, M.P.M., in Stillwater County, Montana, known and described as

Bald Eagle—U. S. Lot No. 69-D

Mountain View—U. S. Lot No. 63-A

Rough Rock—U. S. Lot No. 63-B.

Also, all those certain unpatented quartz lode mining claims situated in Twp. Five (5) South,

Range Fifteen - (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder of Stillwater County, Montana, in the records of said County, on the dates, and in the respective books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Adam	July 19, 1941	24 Misc.	207
Princtons	May 8, 1941	24 Misc.	122
Skunk	May 8, 1941	24 Misc.	128
Sampson	May 8, 1941	24 Misc.	126
Oldco	May 8, 1941	24 Misc.	124
Link	July 19, 1941	24 Misc.	209
Pete	July 11, 1918	7 Misc.	122
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	288
Scully	July 11, 1918	7 Misc.	122
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	286
Denver	Oct. 7, 1918	7 Misc.	233
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	291
Old Lady	July 11, 1918	7 Misc.	114
Westlake	July 11, 1918	7 Misc.	116
Billie	Oct. 17, 1918	7 Misc.	242
Chas. F.	July 11, 1918	7 Misc.	118
(Amended Cert.)			
Old Lady	Oct. 17, 1941	24 Misc.	289
Chas. F.—Continued:			
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	287
Gap	July 31, 1941	24 Misc.	219
(Amended Cert.).....	Oct. 17, 1941	24 Misc.	290
Jame	Oct. 3, 1941	24 Misc.	271
Soup	Oct. 3, 1941	24 Misc.	273
Pine	Oct. 2, 1919	8 Misc.	167

Also, all those certain unpatented quartz lode mining claims situated in Twp. Five (5) South, Range Fifteen (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in [417] Park County, Montana, in the records of the said County, on the dates, and in the respective books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Smelter	Sept. 23, 1887	Vol. 1 Quarts Locations	25
Smelter	June 8, 1889	Vol. 1 Quarts Locations	420

Also, that certain unpatented placer mining claim, and that certain unpatented tunnel site, situated in Twp. Five (5) South, Range Fifteen (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which are recorded in the office of the County Clerk and Recorder in Stillwater County, Montana, in the records of the said County, on the dates, and in the respective books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Lake Placer	July 16, 1940	23 Misc.	400
(Amended Cert.).....	June 16, 1941	24 Misc.	155
Monte Alto Tunnel and Tunnel Site	Aug. 13, 1918	7 Misc.	159

Also, all of the right, title and interest of said lessors, now owned, or which may be hereafter acquired, in and to those certain unpatented quartz lode mining claims situated in Twp. Five (5) South, Range Fifteen (15) East, M.P.M., Stillwater County, Montana, the certificates of location of which were recorded in the office of the County Clerk and Recorder of said Stillwater County, Montana, in the records of said County, on the respective dates, and in the books, and on the respective pages, as follows:

Name	Date Cert. Recorded	Book	Page
Mountain View Chrome Co. #1	Sept. 22, 1939	23 Misc.	43
Mountain View Chrome Co. #2	Aug. 31, 1940	23 Misc.	434

Also, all water and water rights, ditch and ditch rights, flumes, easements, rights-of-way, permits from United States Forest Service, buildings and improvements upon, or used, or for [418] use, in connection with the above described premises.

It Is Further Adjudged and Ordered, that the Clerk of the Court issue to the Marshal of the Court, a Writ of Possession and of Assistance that the Marshal of this Court place the plaintiffs in possession of all and singular the above entitled prop-

erty hereinbefore described, and to be described in such Writ.

It Is Further Adjudged that the plaintiffs have and recover of and from the defendant, Reconstruction Finance Corporation, a corporation, the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six (6%) per cent. per annum from December 21, 1944, until paid; the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six per cent per annum from December 21, 1945, until paid; the sum of One Thousand, Six Hundred, Sixty-six and $66/100$ (\$1,666.66) Dollars, together with interest thereon at the rate of six (6%) per cent per annum from March 1, 1946, until paid; the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six per cent. per annum from March 1st, 1947, until paid; and the sum of Seven Thousand, Fifty-five and $44/100$ (\$7,055.44) Dollars, together with interest thereon at the rate of six (6%) per cent. per annum from November 14, 1947, until paid; and,

It Is Adjudged that defendant, Reconstruction Finance Corporation, a corporation, is the owner, and entitled to the possession of all houses, buildings, or structures situated, and being upon the Lake Placer Mining Claims and without requirement of immediate removal.

It Is Adjudged that the plaintiffs have and recover their costs of suit to be fixed by the Clerk

of this Court, and taxed at the sum of One Hundred Ninety-seven and 29/100 Dollars.

Dated this 11th day of June, 1949.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 11, 1949. [419]

[Title of District Court and Cause.]

MOTION TO MAKE ADDITIONAL FINDINGS

Come now the above named plaintiffs, and move the above entitled court to make additional Findings of Fact in the above entitled cause so as to cover all of the material issues presented in the case, and in support of the said Motion, plaintiffs move and request the court to specially find as follows:

I.

The defendant did not leave intact the "foundations" or "wooden buildings" upon the demised land, but while wrongfully holding possession from plaintiffs, after March 1st, 1946, and previous to September 1st, 1946, without plaintiffs' consent, tore out from, and stripped the said buildings of all plumbing in place, all wiring in place, some doors and windows and oil storage tanks in place, and pipes appurtenant, and carried off of the demised land the said plumbing, wiring, oil storage tanks, piping, doors and windows, and converted the same to its uses.

II.

That the reasonable and necessary costs of replacing the said plumbing, wiring, doors, windows, oil storage tanks [421] and pipes appurtenant thereto, was, and is the sum of Ninety Thousand (\$90,000) Dollars.

III.

The defendant, without plaintiffs' consent, between March 1st and September 1st, 1946, removed from the leased premises and converted to its use, one house of the value of Six Hundred (\$600) Dollars.

IV.

The defendant, without plaintiffs' consent, permitted a third party, after September 1st, 1946, and before the hearing herein, to remove and convert to its own use, and such third party did remove and convert to its own use, and use of defendant, from said premises, twenty-one houses of the value of Seven Hundred (\$700) Dollars each,—a total of Fourteen Thousand, Seven Hundred (\$14,700) Dollars.

This motion is made and based upon the pleadings and evidence introduced in the trial of the above entitled cause.

Dated at Butte, Montana, this 18th day of June, 1949.

THOMAS C. COLTON,

H. L. MAURY,

A. G. SHONE,

Attorneys for plaintiffs.

Service of the foregoing Motion is hereby acknowledged, and copy thereof received this 18th day of June, 1949.

JOHN B. TANSIL,
FRANKLIN A. LAMB,
EMMETT C. ANGLAND,
Attorneys for defendant.

[Endorsed]: Filed June 18, 1949. [422]

[Title of District Court and Cause.]

MOTION TO REOPEN FINAL JUDGMENT
AND TO TAKE ADDITIONAL TESTIMONY

The defendant, Reconstruction Finance Corporation, pursuant to Rule 60 (b), Federal Rules of Civil Procedure, moves the court for an order reopening the judgment entered in this cause on June 11, 1949, and for an order directing that additional testimony be taken on the factual issue relating to the date that actual production was terminated by Metals Reserve Company, or its agent, on the leased premises. It is further moved that the findings of fact and conclusions of law be amended to conform with such additional proof and that judgment be entered accordingly.

The grounds for this motion are as follows:

1. The part of the judgment in this case which awards money damages to the plaintiffs in the sum of approximately \$50,000 is predicated solely upon the absence of proof in the record that production

ceased at any time prior to the date the lease was terminated (Finding of Fact No. VII).

2. As an unqualified matter of fact, however, there can be no question, nor is there any dispute, that the mine and mill were not actually operated in 1944 and 1945 or any time thereafter. There is submitted herewith the affidavits of David R. Nelson, Hugh G. Nisely and Martin C. Messner and detailing the fact that the operation and all production at the mine terminated prior to January 1, 1944. [424]

3. No issue was ever raised either in the pleadings or at the trial with respect to the fact that production ended in 1943. In fact the matter was first alluded to in the plaintiffs' reply brief. Under the lease the plaintiffs were entitled to a minimum royalty and a greatly increased royalty in time of production. Their action was brought solely for a minimum royalty. No accounting was asked for production royalties. This could only mean that they acknowledged there had been no production in 1944 and 1945. In any event, the whole theory of their suit was based on the presumption of nonproduction.

4. At the trial, the defendant introduced (a) its Exhibit No. 7, showing that cessation of production was ordered by the War Production Board on September 16, 1943 (b) its Exhibit No. 17, showing that Metals Reserve Company, on September 22, 1943, directed its agent, the Anaconda Mining Company, to close down the operation, and (c) its Exhibit No. 13, showing that on December 13, 1943,

Metals Reserve Company informed the plaintiffs that production had ceased. Plaintiffs objected to these exhibits only on general grounds. At no time did they suggest that there was any doubt or even any issue with respect to the fact that production was terminated in 1943. Throughout the trial no mention of this issue was ever made. The lengthy hearing was confined entirely to the other issues of the case.

5. It is not the purpose of this motion to re-argue here the contention that the record as now constituted shows that production ended in 1943. It seems meaningless to argue as a matter of law a subject which can be definitely settled by two minutes of uncontradictable testimony. Consequently, it is respectfully represented to the court that there can be no honest dispute that production ended in 1943, that the proof on this issue can be completely covered by the addition of a few questions and answers to one witness. The failure to put in this simple bit of undisputed testimony was the result of a mistake and inadvertence caused by the way the issues were framed, the lack of any presentation of an issue on this point, the absolute lack of any prior contention by the plaintiffs that production had not ceased, the knowledge that the plaintiffs were entirely familiar with the operations including the beginning and cessation of production on the leasehold area and the conclusion that the documentary evidence, unchallenged on this point, completely covered the issue.

6. As the matter now stands, the defendant has had judgment entered against it in approximately the sum of \$50,000 by reason of a particularly close question relating to the burden and sufficiency of proof. It is submitted that substantial justice requires that an opportunity be given to dispel all and any doubts on the relatively simple factual issue.

RECONSTRUCTION FINANCE
CORPORATION,

By JOHN B. TANSIL,
United States Attorney.

FRANKLIN A. LAMB,
Assistant United States
Attorney.

By JOHN B. TANSIL,
THOMAS L. McKEVITT,
THOMAS L. McKEVITT,
Attorney, Department of
Justice.

By JOHN B. TANSIL.

[Endorsed]: Filed July 20, 1949. [426]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given the Reconstruction Finance Corporation, a corporation, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action to June 11, 1949.

THOMAS L. McKEVITT,
Assistant U. S. Attorney
General.

WILLIAM T. LENNON,
Assistant General Counsel,
War Assets Administration.

JOHN B. TANSIL,
U. S. District Attorney,
District of Montana.

FRANKLIN A. LAMB,
Assistant U. S. District Attorney, District of Mon-
tana.

[Endorsed]: Filed Aug. 9, 1949. [428]

[Title of District Court and Cause.]

ORDER

Upon the reading and filing of the petition of Reconstruction Finance Corporation, the defendant above-named, and good cause showing:

It Is Ordered that the defendant Reconstruction Finance Corporation shall have ninety days from and after August 9, 1949 within which to prepare and file its record on appeal in the Ninth Circuit Court of Appeals.

Done this 14th day of September, 1949.

CHARLES N. PRAY,
U. S. District Judge.

[Endorsed]: Filed, entered Sept. 14, 1949. [432]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The district court erred in finding as follows:

VII. "The defendant failed to introduce sufficient evidence at the trial to show that any act occurred sufficient to relieve the defendant, or its predecessor, the Metals Reserve Company, from the duty to pay minimum royalty under paragraph 24, and the burden of proof as hereafter found in Conclusions of law, is upon the defendant to show absolution by reason of any exception set out in paragraph 24 of the lease. Lessee agreed in the lease to carry on its operations diligently."

2. The district court erred in finding as follows:

X. "The lease provided that upon the termination, lessee should surrender peaceably the leased premises and appurtenances in good order with the maintenance of possessory claims and rights and

permits fully met, and that lessors should have the right to re-enter upon the leased premises owned by them, and appurtenances, and take full and complete possession of the whole thereof. That the lessee has not surrendered the said premises, or any part thereof, to the lessors; that lessee, by show of force, and armed guards and servants in possession, has wrongfully withheld the possession of the said premises, and all thereof, from the plaintiffs, and this up to the conclusion of the evidence in this case, towit: [434] November 14th, 1947."

3. The district court erred in finding as follows:

XIV. "The amount equalling the minimum rental due and unpaid during the period the defendant has held wrongfully the premises from March 1st, 1946, until the trial, is Seventeen Thousand, Fifty-five and 44/100 (\$17,055.44) Dollars."

4. The district court erred in finding as follows:

XVIII. "That the reasonable rental value of the premises described in the lease agreement, during the period from March 1, 1946, to the conclusion of the trial, November 14, 1947, was, and is, the reasonable sum of Ten Thousand (\$10,000) Dollars per year."

5. The district court erred in holding that appellant was liable for minimum royalties from January 1, 1944, to February 28, 1946, pursuant to the agreement of December 20, 1941.

6. The district court erred in holding that appellant was liable to appellee at the rate of \$10,000

a year for occupancy of the leased premises from March 1, 1946, to November 14, 1947.

7. The district court erred in entering judgment for appellee in the sum of \$38,722.10 with interest.

By /s/ A. DEVITT VANECH,
Assistant Attorney General.

/s/ JOHN B. TANSIL,
United States Attorney,
Billings, Montana.

/s/ JOHN F. COTTER,
Attorney, Department of
Justice, Washington, D. C.

/s/ FRANKLIN A. LAMB,
Assistant U. S. Attorney,
Billings, Montana.

Service of the foregoing Statement of Points on Appeal and receipt of a true copy of same acknowledged this 20th day of September, 1949.

THOMAS C. COLTON,
Of Counsel for Plaintiffs.

[Endorsed]: Filed Sept. 21, 1949. [435]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The Reconstruction Finance Corporation, appellant in the above-entitled cause, designates the following for inclusion in the record on appeal:

Complaint. Filed September 17, 1946.

Motion to dismiss by War Assets Administration. Filed November 17, 1946.

Answer of Reconstruction Finance Corporation. Filed November 26, 1946.

Order granting motion to dismiss and dismissing cause as to War Assets Administration. Filed October 25, 1947.

Record of proceedings at the trial.

Plaintiffs' Exhibit No. 1.

Plaintiffs' Exhibit No. 2.

Court's decision and order for judgment. Filed February 28, 1949.

Court's findings of fact and conclusions of law. Filed June 11, 1949.

Judgment. Filed June 11, 1949.

Defendant's notice of appeal. Filed August 9, 1949.

Statement of points upon which appellant relies.

This designation of the contents of the record on appeal.

RECONSTRUCTION
FINANCE CORPORATION,
Appellant.

By /s/ A. DEVITT VANECH,
Assistant Attorney General.

/s/ JOHN B. TANSIL,
United States Attorney,
Billings, Montana.

/s/ JOHN F. COTTER,
Attorney, Department of
Justice, Washington, D. C.

/s/ FRANKLIN A. LAMB,
Assistant U. S. Attorney,
Billings, Montana.

Service of the foregoing Designation of Record on Appeal and receipt of a true copy of same acknowledged this 20th day of September, 1949.

THOMAS C. COLTON,
Of Counsel for Plaintiffs.

[Endorsed]: Filed Sept. 21, 1949. [438]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF THE RECORD AND PROCEEDINGS
TO BE INSERTED IN THE RECORD ON
APPEAL.

To the Defendant Above Named, and to Its Attorneys of Record, and to the Clerk of the Above Entitled Court:

Plaintiffs in the above entitled action hereby designate the following additional portions of the record and proceedings for inclusion in the record on appeal.

Plaintiffs' motion to make additional findings. Filed June 18, 1949.

Court order or decision on plaintiffs' motion to make additional findings; if there be no order or decision thereon, then the Certificate of the Clerk to that effect.

Defendant's motion to re-open final judgment, and to take additional testimony. Filed July 20, 1949.

Court order or decision on defendant's motion to re-open final judgment and to take additional testimony; if there be no order or decision thereon, then the certificate of the Clerk to that effect.

Order granting motion of plaintiffs to file certified copy of decision of the Secretary of the Interior on appeal from the Bureau of Land Management. Filed March 3, 1949.

Certified copy of decision of the Secretary of the

Interior on appeal from the Bureau of Land Management. Filed March 3, 1949. [440]

This designation of additional portions of the record and proceedings in record on file.

THOMAS C. COLTON,
H. L. MAURY,
A. G. SHONE,
Attorneys for plaintiffs.

Service of the foregoing Designation of Additional Portions of the Record and Proceedings in the record on appeal, and receipt of a true copy of same is hereby acknowledged this 27th day of September, 1949.

RECONSTRUCTION
FINANCE CORPORATION,
Appellant.

By JOHN B. TANSIL.
FRANKLIN A. LAMB.
JOHN F. COTTER.
A. DEVITT VANECH.

[Endorsed]: Filed Sept. 27, 1949. [441]

[Title of District Court and Cause.]

ORDER

Plaintiff's Exhibit No. 1, and Plaintiff's Exhibit No. 2, having heretofore been introduced in evidence in the above-entitled cause, at the trial thereof, and having been by the defendant, Reconstruction Finance Corporation, designated for inclusion in the

Record on Appeal herein, and good cause now appearing therefor,

It Is Hereby Ordered that said Plaintiff's Exhibit No. 1, and Plaintiff's Exhibit No. 2, be transmitted by the Clerk of this Court to the United States Court of Appeals for the Ninth Circuit, for inclusion in the Record on Appeal herein.

Dated this 10th day of October, 1949.

CHARLES N. PRAY,
United States District Judge For The District Of
Montana.

[Endorsed]: Filed, entered October 10th, 1949.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States for the District of Montana, do hereby certify that the annexed and foregoing volume consisting of 444 pages, numbered consecutively from 1 to 444 inclusive, constitutes a full, true and correct transcript of all portions of the record in case Number 871, May Paula Mouat, et al., Plaintiffs, versus Reconstruction Finance Corporation, Defendant, designated by the parties as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that at the date of this certificate,

no order or decision has been filed or entered on the Defendant's Motion to re-open final judgment and to take additional testimony, in the aforesaid case; and that no order or decision has been entered or filed, at the date of this certificate, on plaintiff's motion to make additional findings in said case.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part of the record on appeal, original exhibits Nos. 1 and 2, which were offered by the plaintiff and received in evidence at the trial of said cause, and which are designated by the defendant as part of the record on appeal herein.

I further certify that the costs of the annexed transcript of record on appeal amount to the sum of Eighty and 20/100 Dollars and have been made a charge against the United States of America for the reason that no cash fees can be collected from the defendant, the Reconstruction Finance Corporation, herein, it being an agency of the United States of America.

Witness my hand and the seal of said Court at Great Falls, Montana, this 20th day of October, A. D. 1949.

H. H. WALKER,
Clerk as aforesaid.

[Seal] By /s/ C. G. KEGEL,
Deputy. [444]

[Endorsed]: No. 12389. United States Court of Appeals for the Ninth Circuit. Reconstruction Finance Corporation, a corporation, Appellant, vs. May Paula Mouat and M. W. Mouat, wife and husband and May Paula Mouat, as trustee of an express trust, Appellees, and May Paula Mouat and M. W. Mouat, wife and husband and May Paula Mouat, as trustee of an express trust, Appellants, vs. Reconstruction Finance Corporation, a corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Montana.

Filed October 24, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12389

RECONSTRUCTION FINANCE CORPORATION,

Appellant,

vs.

MAY PAULA MOUAT, ET AL.,

Appellees.

STATEMENT OF POINTS AND DESIGNA-
TION OF THE PORTIONS OF THE
RECORD TO BE PRINTED.

The Reconstruction Finance Corporation, appellant in the above-entitled cause, adopts the statement of points filed in the district court as the statement of points to be relied upon in this Court, and desires that of the record as filed by it and certified there should be printed everything but Plaintiffs' Exhibits No. 1 and No. 4.

RECONSTRUCTION
FINANCE CORPORATION,
Appellant.

By /s/ A. DEVITT VANECH,
Assistant Attorney General.

/s/ JOHN F. COTTER,
Attorney, Department of
Justice, Washington, D. C.

[Endorsed]: Filed Nov. 3, 1949.

In the District Court of the United States in and
for the District of Montana

No. 871

MAY PAULA MOUAT, et al,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION.

This cause was duly called for hearing this day on plaintiffs' Motion to make additional findings, and on defendants' motion to re-open Final Judgment and to take additional testimony.

Mr. H. L. Maury and Mr. A. G. Shone were present and appeared for the plaintiffs, and Mr. Franklin A. Lamb was present and appeared for the defendant, Reconstruction Finance Corporation.

Thereupon the motions were duly argued by counsel for respective parties, whereupon Court ordered that briefs or memorandums of authorities be filed thereon. The plaintiffs were granted twenty days from today within which to file their brief or memorandum of authorities in support of their motion to make additional findings, and the defendant Reconstruction Finance Corporation was granted twenty days after receipt of copy of plaintiffs' brief or memorandum, within which to file its brief on said motion.

Thereupon the defendant was granted twenty days from today within which to file its brief in support of its motion to re-open the Final Judgment

herein, and the plaintiffs were granted twenty days after receipt of copy of defendant's brief, within which to file their brief in answer thereto, and that upon the filing of the last brief, or the expiration of the time allowed therefor, the said motions shall be considered as submitted and by the Court taken under advisement.

Thereupon, on motion of Mr. H. L. Maury, counsel for plaintiffs, it is ordered that the plaintiffs be and are granted thirty-five days from and after receipt of notice of completion of the record on the appeal taken by the Reconstruction Finance Corporation herein, within which to prepare their record on appeal.

Entered in open Court at Great Falls, September 27, 1949.

H. H. WALKER,

Clerk,

By C. G. KEGEL,

Deputy.

In the District Court of the United States, in and
for the District of Montana, Billings Division

Civil Action No. 871

MAY PAULA MOUAT and M. W. MOUAT, wife
and husband, and MAY PAULA MOUAT, as
Trustee of an express trust,

Plaintiffs,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, a corporation,

Defendant.

ORDER DENYING MOTION TO RE-OPEN
FINAL JUDGMENT

The motion of defendant to re-open final judgment and take additional testimony was submitted on briefs of counsel for the respective parties which have been given consideration by the court with the result that the court, being now duly advised, is of the opinion that the motion should be denied, and such is the order of the court herein.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered Nov. 7, 1949.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO MAKE
ADDITIONAL FINDINGS

Motion by plaintiff in the above entitled cause to make additional findings therein and thereby increase the amount of the judgment, came on regularly for hearing on briefs submitted by counsel for the respective parties, and the court having considered the same and being duly advised, and good cause appearing therefor, is now of the opinion that the said motion should be overruled and denied, and such is the order of court herein.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered Nov. 7, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL BY PLAINTIFFS

Notice Is Hereby Given, that May Paula Mouat and M. W. Mouat, wife and Husband, and May Paula Mouat, as trustee of an express trust, being plaintiffs above named, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from parts of the final judgment entered in this action on June 11, 1949, as follows:

1.

That portion of said judgment wherein "It is adjudged that defendant, Reconstruction Finance Corporation, is the owner, and entitled to the possession of all houses, buildings, or structures situated, and being upon the Lake Placer Mining Claim and without requirement of immediate removal."

2.

Wherein the said judgment fails to adjudicate that the said plaintiffs were entitled to a judgment for any sum of money at all for waste as to the removal and conversion of the plumbing fixtures of buildings on the Lake Placer, and other strip and waste by destruction of buildings, removal of fixtures, removal of buildings, and all waste committed at the leased premises by defendant.

3.

Wherein the said judgment fails to adjudicate that the plaintiffs were entitled to Six Hundred Dollars each, or any sum, whatever, for the destruction of twenty-two residence buildings on the said Lake Placer.

THOMAS C. COLTON,

LOWNDES MAURY,

A. G. SHONE,

Attorneys for plaintiffs and
cross appellants.

[Endorsed]: Filed Nov. 21, 1949.

In the United States Court of Appeals
For the Ninth Circuit

Civil Action No. 871

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellant,

vs.

MAY PAULA MOUAT and M. W. MOUAT, wife
and husband, and May Paula Mouat as trustee
of an express trust,

Appellees.

Also, MAY PAULA MOUAT and M. W. MOUAT,
wife and husband, and MAY PAULA MOUAT
as trustee of an express trust,

Appellants,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Cross-Appellees.

STATEMENT OF POINTS TO BE RELIED ON
BY PLAINTIFFS' CROSS APPEAL

The written lease from plaintiffs to Reconstruction Finance Corporation (Metals Reserve Company), provided: (a) "Upon the termination of this lease for any reason by either party, lessee shall have six (6) months additional time to remove from the leased premises its personal property and its

tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timbering, ties, and all excavations, foundations, wooden mine structures, wooden tramway towers, and wooden buildings erected upon the demised premises * * *". Lessee terminated the lease by written notice February 28, 1946; there were then standing on the leased premises 81 wooden buildings with plumbing and lighting fixtures; before August 28, 1946, lessee extracted and converted plumbing and fixtures from all these buildings, and converted same to its own use.

Cross appellants assert that the Court erred in finding that these buildings were the property of Reconstruction Finance Company after February 28, 1946.

2.

Cross-appellants assert that the Court erred in not giving them judgment for at least the lowest value named in the evidence of 22 of these buildings removed by lessee before suit brought, to-wit: \$400.00 for each, total \$8,800.00.

3.

Cross-appellants assert that the Court erred in not giving them judgment for at least the lowest value of the plumbing and other fixtures removed by lessee after February 28, 1946, and before complaint filed, September 17, 1946, i.e., \$11,795.52.

4.

The lease provided that it should be construed by

Montana Law. The Court erred in not giving the landlords judgment for \$90,000.00, the lowest estimate in the evidence of the necessary cost of replacement of the plumbing and fixtures in the buildings.

5.

This suit was commenced more than six months after lessee terminated the lease; 81 buildings (though fixtures extracted) were standing on the premises at the trial. The lease provided: "20. Lessee agrees with lessors that unless there is an understanding to the contrary in writing, anything remaining on the premises herein demised and leased, upon the termination thereof, for a period of six months after such termination, shall conclusively be deemed to have been abandoned by the lessee in favor of the lessors."

The Court erred in adjudging that these buildings were not the property of cross-appellants.

6.

The Court erred in permitting the lessee to introduce evidence by parol to vary or explain the written contract, for that it is plain on its face; for that neither its validity, as written, nor any variance from its plain meaning, was put in issue in the answer.

7.

The Court erred in permitting the lessee to introduce evidence to impair or dispute the lessors' title to the Lake Placer, one of the 21 mining claims demised.

8.

The Court erred in not finding more fully on the facts as requested in cross-appellants' motion so to do, served and filed within 10 days after entry of judgment, to-wit:

9.

The Court erred in not finding specially that the defendant did not leave intact the foundations or wooden buildings upon the demised land, but while wrongfully holding possession from plaintiffs after March 1st, 1946, and previous to September 1, 1946, without plaintiffs' consent, tore out from, and stripped the said buildings of all plumbing in place, some wiring in place, some doors and windows and oil storage tanks in place, and pipes appurtenant, and carried off of the demised land the said plumbing, wiring, oil storage tanks, piping, doors and windows, and converted the same to its use.

10.

The Court erred in not finding specially that the reasonable and necessary costs of replacing the said plumbing, wiring, doors, windows, oil storage tanks, and pipes appurtenant thereto, was, and is the sum of Ninety Thousand (\$90,000) Dollars.

11.

The Court erred in not finding specially the defendant, without plaintiffs' consent, between March 1st and September 1st, 1946, removed from the leased premises, and converted to its use, one house of the value of \$600.00.

12.

The Court erred in not finding specially that the defendant, without plaintiffs' consent, permitted a third party, after September 1st, 1946, and before the hearing herein, to remove and convert to its own use, and such third party did remove and convert to its own use, and use of said defendant, from said premises, twenty-one houses of the value of Seven Hundred (\$700) Dollars each—a total of Fourteen Thousand, Seven Hundred (\$14,700) Dollars.

THOMAS C. COLTON,
H. L. MAURY,
A. G. SHONE,

Attorneys for cross-
appellants.

[Endorsed]: Filed Nov. 25, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Defendant, Reconstruction Finance Corporation a Corporation, and to Its Attorneys of Record, and to the Clerk of the Above Entitled Court:

May Paula Mouat and M. W. Mouat, wife and husband, and May Paula Mouat as trustee of an express trust, having on the 21st day of November, 1949, filed their Notice of Appeal to the United

States Court of Appeals for the Ninth Circuit from parts of the final judgment entered in the above entitled action on June 11, 1949, do hereby adopt by reference, the record on appeal designated by defendant, Reconstruction Finance Corporation, a corporation, and the additional portions of the record on appeal designated by plaintiffs herein, and plaintiffs and cross-appellants hereby designate in addition thereto the following portions of the record and proceedings for inclusion in the record on appeal, to-wit:

1. The Clerk's Minute Entry of September 27, 1949, showing that the motion of Reconstruction Finance Corporation, a corporation, to re-open final judgment and take additional testimony, was on said day, in open court, argued by counsel, and submitted to the court on briefs, and by the Court taken under advisement.

2. The Clerk's Minute Entry of September 27, 1949, showing that the Motion of May Paula Mouat and M. W. Mouat, wife and husband, and May Paula Mouat, as trustee of an express trust, to make additional findings, and thereby increase the amount of the judgment in this action, was, on said day, in open court argued by counsel, and submitted to the Court on briefs, and by the Court taken under advisement.

3. Order of November 7th, 1949, denying the Motion of defendant, Reconstruction Finance Corporation, a corporation, to re-open final judgment and take additional testimony.

4. Order of November 7, 1949, denying the Motion of plaintiffs to make additional findings, and thereby increase the amount of the judgment herein.

5. Plaintiffs' Notice of Appeal filed November 21, 1949, and Certificate of the Clerk showing that an Undertaking on Appeal has been filed by plaintiffs.

6. Statement of Points on which plaintiffs and cross-appellants intend to rely.

7. This designation of the additional contents of the record on appeal.

THOMAS C. COLTON,

H. L. MAURY,

A. G. SHONE,

Attorneys for plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 25, 1949.

[Title of District Court.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the annexed and foregoing volume, consisting of 12 pages, numbered consecutively from 1 to 12 inclusive, constitutes a true and correct transcript of all portions of the record in case numbered 871, May Paula Mouat, et al. vs. Reconstruction Finance Corporation, a corporation, designated by the parties as the supplemental record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said Supplemental Transcript of Record amount to the sum of nine and 40/100ths (\$9.40) Dollars, and have been paid by the plaintiffs and cross-appellants.

Witness my hand and the seal of said Court at Great Falls, Montana, this 12th day of December, A. D. 1949.

H. H. WALKER,
Clerk as aforesaid.

[Seal] By /s/ C. G. KEGEL,
Deputy.

[Endorsed]: No. 12389. United States Court of Appeals for the Ninth Circuit. May Paula Mouat and M. W. Mouat, wife and husband, and May Paula Mouat, as trustee of an express trust, Appellants, vs. Reconstruction Finance Corporation, a corporation, Appellee. Transcript of Record on Cross-Appeal. Appeal from the United States District Court for the District of Montana.

Filed December 19, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 12,389

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellant,

vs.

MAY PAULA MOUAT and M. W. MOUAT, wife
and husband, and MAY PAULA MOUAT as
trustee of an express trust,

Appellees.

MAY PAULA MOUAT and M. W. MOUAT, wife
and husband, and MAY PAULA MOUAT as
trustee of an express trust,

Cross Appellants,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Cross Appellees.

STATEMENT OF POINTS AND DESIGNA-
TION OF THE PORTION OF THE REC-
ORD TO BE PRINTED ON CROSS
APPEAL

May Paula Mouat and M. W. Mouat, wife and
husband, and May Paula Mouat as trustee of an
express trust, cross appellants, adopt the statement
of points filed by them in the District Court as

the statement of points to be relied upon in this Court, and desire that the entire record as filed by them and certified by the District Court Clerk to this Court should be printed, and also this adoption of statement of points and designation should be printed.

MAY PAULA MOUAT and M. W. MOUAT, husband and wife, and MAY PAULA MOUAT, as trustee of an express trust,

Cross Appellants,

By THOMAS C. COLTON,

M. L. MAURY,

A. G. SHONE,

Their Attorneys.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 19, 1949.